United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

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76-7493

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United States Court of Appeals

For the Second Circuit.

MAX HABER, individually, and as executor of the Goods, Chattels and Credits that were of GEORGE HABER, Deceased, and MAX HABER, indiv.,

Plaintiff-Appellant,

against

THE COUNTY OF NASSAU and ROBERT SEHLMEYER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

Volume II—Pages 487 to End.

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MR. WEITZ: Your Honor, may I read the statement in the sentence with the form agreed to?

THE COURT: Yes.

MR. WEITZ: This is dated October 1, 1971 -- '72.

To the commanding officer, HPB, from Patrolman Eric R. Hilbig, SH1131.

Q SH stand for shield?

A Shield.

MR. WEITZ: Subject, shooting at Coliseum.

The writer was working a 1600, 2400 tour of duty on September 29, 1972.

THE COURT: Wait a second.

You both better come up here again. Something occurred to me.

(The following takes place at side bar and out of the presence of the jury:)

THE COURT: You talk of this as an admission, but on the other hand it is not an admission on the first claim because the first claim doesn't lie against the County of Nassau. It would only be an admission on the second and third claims.

MR. WEITZ: All right. I understand that.

MR. GARDNER: When you say admission, your

Honor, I don't follow your Honor's thought process on admission. It's certainly not an admission on the part of this defendant.

THE COURT: It's an admission on the County of Nassau.

MR. GARDNER: I don't see any admission made in there.

THE COURT: I would prefer you wait on reading this. I realize the timeliness of it, but I want to give it some thought. You can always read it if we decide it's readable or not on summation. But I am rather troubled to read it as an admission.

MR. WEITZ: I have no objection to waiting. I would merely ask that there be an instruction that I am going to withhold reading it.

THE COURT: Yes, at this time.

MR. WEITZ: All right.

(The following takes place in open court and in the presence of the jury:)

THE COURT: Ladies and gentlemen, there is a rather complex legal question involved here and I want to give it some thought before the document is read so I asked counsel to withhold reading the statement to you at this time. And plaintiff's

counsel has agreed to do so and it may be read to you later, if possible, but at least for the moment it will not be read.

MR. WEITZ: Shall I proceed from that point on?

THE COURT: Yes.

BY MR. WEITZ:

Q Now, Officer, you did have occasion at the scene to speak to other police officers, did you not?

A I did, sir.

Q How long did you remain at the scene of the shooting, sir?

A A few minutes.

Q And when you say a few minutes, you mean more than ten or less than ten?

A I would say less than ten.

Q Less than ten.

Is that more than five minutes or less than five minutes?

A I would put it at approximately five minutes.

Q And then where did you go from the scene of the shooting?

A I was transported to the hospital.

Q A hospital of some sort?

A Yes, the County Medical Center.

Q That's just down the road a piece, isn't it?

A Down the road a piece, yes.

Q About how long would it take to get there, Officer?

A Depending on traffic, three to five minutes.

Q All right.

Were you seen immediately at the hospital, Officer?

A Was I seen immediately?

Q Yes.

A By whom, sir?

Q By anybody.

A Yes, sir.

Q So it would be correct to say within approximately ten to fifteen minutes of this occurrence you were at the Nassau County Medical Center being seen and treated by medical personnel, whatever status they are?

A I was at the scene or at the hospital and I was seen. But whether the treatment started that quickly, I couldn't say.

Q But you were seen within ten or fifteen minutes?

A Yes. I arrived. I am sure I was observed.

Q All right.

And --

MR. WEITZ: Just a couple of minutes longer, your Honor, and I may be near the finish of the witness.

Q And, Officer, did you ever make a written report as to the event of the night of September 29th, 1974?

A No, sir, not that I can recall.

Q And, Officer, would you tell us, did anyone other than the Assistant District Attorney, did anyone every question you about the event of that evening?

A Yes, sir.

Q And was there a stenographer present at any such time?

A No, sir, I don't believe so.

Q And were they police officials who questioned you about that?

A Yes, sir, they were.

Q And, of course, you testified at this Examination Before Trial that I read to you from?

A Yes.

Q I am sorry, I don't think -- yes, I did read

to you today.

A Yes, sir.

MR. WEITZ: Thank you.

I don't have anything else, your Honor.

CROSS-EXAMINATION

BY MR. GARDNER:

Q Sergeant Sehlmeyer, you're married, sir?

MR. WEITZ: Objection.

A Yes, sir, I am.

MR. WEITZ: I am sorry I didn't rise, Judge, but I did have an objection.

THE COURT: You are overruled.

Q You were married on September 29th, 1972?

A Yes, I was.

Q Do you have children?

MR. WEITZ: Objection, your Honor.

A Yes, sir.

THE COURT: Overruled.

Q How many?

A Three.

Q Kindly tell us what their respective ages and respective sexes are.

A My oldest boy is fifteen years. My daughter is twelve and my younger son is nine.

Q Now, during the course of this litigation you were examined at an Examination Before Trial on January the 23rd, 1975. Is that correct?

A Yes, sir.

Q And the lawyers from the plaintiff's office, Mr. Weitz' office, they asked you questions under oath on January 23, '75, correct?

A Yes, sir.

Q And it was reduced to a transcript which was read here by Mr. Weitz and some of which was read to you and it's called an Examination Before Trial, right?

A That's correct, sir.

Q And you reviewed it and looked at it before you took the stand and testified as you did in response to the specific questions that Mr. Weitz chose to ask you today, right?

A That's correct, sir.

Q In addition to that, the day after the occurence -- no, two days after, on October 2nd, 1972, did you answer specific questions that were asked you by the Assistant District Attorney, Frank P. Dillon?

A Yes, sir.

Q And was that reduced to a transcript to indicate what you said in response to the District At-

torney's questions on October 2nd, '72, two days after the event?

A Yes, sir.

Q Did you ever -- did I ever or did anyone ever give you a copy of the transcript of the questions and answers that you gave to the District Attorney on October 2nd, '72, prior to your testifying in response to Mr. Weitz' specific question?

A No, sir.

Q I believe you told us before that the only thing you used to refresh your recollection was the testimony you gave in response to his questions by his lawyer from his office in January of '75, right?

A That is correct, sir.

Q And from the District Attorney's transcript, Mr. Weitz asked you several questions from page 14. Do you recall that?

A I know he asked me questions. I don't know if they came from page 14.

MR. GARDNER: Now, if your Honor please, I am going to read this jury questions and answers that were given to this witness, questions asked by the Assistant District Attorney and given by this witness at a question and answer session on

the 2nd of October, 1972.

MR. WEITZ: Are you going to read them all?

MR. GARDNER: Yes, I will read them all.

MR. WEITZ: If your Honor please, may I be permitted to object to form, as to the form of some of these questions?

THE COURT: Perhaps you two would be good enough to furnish me -- do me the courtesy of furnishing me with a copy so I can follow and rule.

MR. WEITZ: The one I subpoenaed, your Honor.

MR. GARDNER: If Mr. Weitz does not have an additional copy, I would be pleased to wait.

MR. WEITZ: I have a photocopy, your Honor.

MR. GARDNER: Page one is the title of the caption, In the Matter of a 4154/72.

And the transcript starts in question and answer form on page two.

Sergeant Robert H. Sehlmeyer --

MR. WEITZ: If your Honor pleases, I will object to the first question as not being a question. It's a statement.

MR. GARDNER: It's my posture, if your Honor please, on behalf of my client, that Mr. Weitz saw fit to ask one series of questions on page 14 --

THE COURT: I understand. 44A

MR. GARDNER: And he has opened the door and I intend to walk through it. And I want to read to the jury the entire transcript of the sergeant's answers on October 2nd, '72.

THE COURT: All right.

It's not that long, if the jury will bear with me, and let me scan through it and I will then be able to rule on objections.

MR. WEITZ: Your Honor, I have objected to the reading of anything that doesn't relate to the material on page 14. I have objected to things that do not relate to the material.

THE COURT: The only question I have, the first question may not be necessary, but it does state who was there.

MR. WEITZ: It's also stated on the first page of the transcript. The outside cover states who was there. And I don't have any dispute who was there.

THE COURT: Why do you object to the first question?

MR. WEITZ: Because this is all window dressing, your Honor. That's the way I feel about it

and I don't think it's relevant. I would object even as to certain similar questions on page 3, the middle of the page, the words appear as the question starting, "Now, Sergeant".

THE COURT: Yes.

MR. WEITZ: And the last question on that page for the same reason.

And thereafter only a few questions which I think are leading and suggestive as to the form of these questions.

I think if you want to do this at side bar I can go question by question as to whether I have an objection or not and then we may have one continuous reading; whatever the Court suggests.

THE COURT: Step up here for a minute.

(The following takes place at side bar out of the hearing of the jury:)

THE COURT: Technically I have your position, Mr. Weitz, which is very simple. You say you shouldn't read the question of his rights.

Mr. Gardner didn't raise the question of the testimony before the Grand Jury in the Grand Jury investigation and bring out all of the facts with respect to the Grand Jury hearing. It was brought

out by you.

MR. WEITZ: This is not the Grand Jury hearing.

THE COURT: I understand, but this is preparatory to taking the case to the Grand Jury. And the case was taken to the Grand Jury.

Now, you allege in here in this complaint, and certainly paragraphs one and five, at least five is relevant, I think, if at all, that he has actually done this with malice, arbitrarily, reckless and willful abandon.

Now, I would have to go back and recheck this, the criminal violation of the Civil Rights Law. But I don't think it's that much different than what you have alleged here in the civil case. Nor am I fully cognizant in my present state of mind as to the distinction as to what is required other than proof beyond a reasonable doubt in a criminal case than what is required in a civil case for a violation of civil rights.

As I understand it, they are essentially the same, except for the quantum of proof. And so when you talk about malice and you talk without justification and arbitrarily, you are talking about a willfulness.

MR. WEITZ: We are talking in the disjunctive, your Honor.

THE COURT: I know. You are talking about a willfulness and it may apply to both.

Now, if a man comes in and he is questioned immediately after or shortly after the event and he waives all his rights and waives all his rights to have a lawyer, isn't that some evidence as to whether or not this was willfully done?

MR. WEITZ: Judge, I read the questioning. I will state for the record whatever it might seem, that I have never seen such a flagrant straight-out coddling and whitewash of the witness. By making statements of some of these questions, didn't you tell me, when it was never even said in the transcript, I think this District Attorney should have been sanctioned and I think it's disgraceful what he did. And it's not only this witness, it was other witnesses also.

So when you're making a suggestion or drawing a conclusion, your Honor, of course you have not read the entire testimony or all of it.

THE COURT: I haven't read any of it.

MR. WEITZ: When you think and when you draw

the conclusion -- and this is what I am trying to avoid -- that here is a man who is waiving his rights, what I say, Judge, this is a setup. And by waiving his rights, I may say it's of no relevance. And since it does carry some weight in the Court's mind, it may carry weight in the jury's mind. And it's extremely collateral and extraneous to the issues. And it certainly is not in explanation of that which I read as to where his hand was at the time the gun came out of the holster.

MISS BILLAVER: I believe 801D (1) covers the situation in that I believe Mr. Weitz sought to or implied that much of the witness' recent statements were recent fabrications.

THE COURT: It doesn't cover the rights question, which is what is troubling me. I am not troubled by the first question as to who was there. If there is any part of this thing the record is entitled to know who was present at the time of the questioning. But the rights question bothers me. I think you can go either way on it.

MR. GARDNER: Your Honor, my posture, if your Honor pleases, it was Mr. Weitz who asked of Sergeant Fehn what was the purpose of the investigation.

And he said the purpose was to send a team over to the Grand Jury.

And I think it's essential on that aspect since he opened it, I didn't, to follow up what this man's posture was and in terms of waiving immunity, if that's what he did, and further, what the status of his mind was, whether what he did was a deliberate malicious and intentional act.

THE COURT: What do we get out of this? There is some proof coming here that the Grand Jury returned a no true bill.

MR. GARDNER: I will ask him that.

THE COURT: Did he appear before the Grand Jury?

MR. GARDNER: I have no idea.

THE COURT: Well, you must know.

MR. GARDNER: I don't, your Honor.

MR. WEITZ: I might remind the Court, we were at a point in this case where the Grand Jury minutes were directed --

THE COURT: I have part of them.

MR. WEITZ: Yes, but you apparently don't have anything which may relate to this which is a strange sort of thing.

THE COURT: Do you know whether he appeared?

MR. GARDNER: I don't have the slightest notion, Judge.

THE COURT: Does anybody?

MR. GARDNER: I can ask him.

Why don't we do this, Judge: Let's hold this off and we can resolve it overnight and come back with our --

MR. WEITZ: I think you may want to ask him out of the presence of the jury, just as an aid to ruling as to whether he appeared before the Grand Jury.

THE COURT: Let's skirt the issue at the moment.

MR. WEITZ: Surely.

(The following takes place in open court and in the presence of the jury:)

THE COURT: Ladies and gentlemen, again I think I can say with some certainty that portions of this statement will be read to you. But at the moment there are portions that I think we have to do a little legal research on before the entire thing is read to you. And rather than read it to you piecemeal, the attorneys have agreed to hold

off and pursue another line of questioning.

MR. GARDNER: And we will return to it at another time once we have resolved this issue, your Honor.

BY MR. GARDNER:

Q Sergeant, on the 29th of September, 1972, you were on duty as a police officer in Nassau County. Is that right?

A Yes, sir, I was.

Q And during the time, at the time you went on to work that day, approximately three o'clock, was it?

A My tour of duty started at three, but we report a little earlier than that, sir.

Q From that time, the time you reported until the time you ultimately found yourself in the hospital following an incident that occurred, you were in the performance of your police duties, were you not?

A I was, sir.

Q And as a police officer in Nassau County, along with the other officers in Nassau County, you are required to have certain equipment called standard equipment?

A Yes, sir.

Q By the way, does Nassau County or the citizens

of the County buy or pay for the equipment of a police officer or is a police officer required to buy it himself?

A A police officer is required to buy it himself.

Q But is it purchased through the Department?

A It is purchased through the Department, yes.

Q So you and every other officer has to pay for whatever the cost of the equipment is. Is that right?

A Yes, sir.

Q And whether you have or don't have the equipment, that's a decision made by the Department?

A Yes, sir.

Q And the equipment that you told us about, everything you had on there that evening, that was regulation equipment that you were required to carry. Is that right?

A Yes, sir.

Q Now, the events of that evening, Officer, they didn't happen in little frames of time, did they?

A No, sir.

Q What occurred to you, were it not, were events as in the normal course of life that were flowing, minute to minute? Isn't that so?

A That's correct, sir.

Q Now, that evening when you arrived at the Coliseum, can you give us an approximation as to how many cars were parked in the complex that surrounded -- the parking complex that surrounded the Coliseum itself, approximately?

A I would have to say thousands.

Q And were these cars parked in rows so that there would be two cars, one in front of another, and then an aisle and then another set of cars and then another two set of cars and then another two set of cars?

A They probably would be parked face to face, two to a row and then an aisle and then two more rows of cars facing each other.

Q So we have some idea physically what it looked like, if somebody were walking along the row of cars there would be to one's left a row of cars, and behind that a row of cars, and to one's right a row of cars, and to one's right another row of cars. Is that right?

A That's right, sir.

Q So that there would be two cars front to back, an aisle, and two cars front to back in each aisle. Is that correct?

A Right, sir.

Q And how long were these aisles, approximately?

A A couple of thousand feet.

MR. WEITZ: May I have that answer read back?

MR. GARDNER: A couple of thousand feet.

MR. WEITZ: A couple, two thousand?

MR. GARDNER: A couple.

Q And there being thousands of automobiles surrounding the Coliseum, were there a lot of people when you arrived?

A There were, I assume, a large number inside the Coliseum.

Q And was the concert in progress, this rock concert in progress when you arrived?

A Yes.

Q Could you hear the noise?

A Yes, sir, I could hear the noise.

Q Music?

A Music.

Q Do you know how long that concert had been going on, that rock concert had been going on when you arrived?

A I believe it started in the vicinity of eight o'clock, sir.

Q And you arrived at approximately when?

A Eleven.

Q And at that time were there people milling around the outside of the Coliseum?

A Yes, sir.

Q Do you know if any were trying to get in even at that late hour?

A I didn't pay any attention to that, sir.

Q Now, in addition to your obligations as a sergeant of the Highway Patrol at that time, in addition to your duties, one of which you said was traffic, did you have any other duties?

A Yes, sir.

Q And did some of those duties have to do with ma'ntaining the peace and the security of the peopel who were within the parking area?

A That is one of my duties at all times, no matter where I am.

Q Now, there came a time, did there not, when you approached or were approached by two girls you said in their teens, correct?

A I estimated them to be in their teens, yes.

Q Just tell us in your own words, Sergeant, what occurred when those girls came over to you and what they said to you and you said to them and what

they pointed to, if anything, in your own words, so that we get it chronologically; that means as it flows naturally as it happened to you.

MR. WEITZ: Objection. Objection to the form of the question, your Honor.

THE COURT: Well --

MR. GARDNER: I will rephrase it.

MR. WEITZ: And also, if your Honor please, I would even object, unless we have specific individuals. I am not talking by name, but a specific person identified as having said a particular thing.

THE COURT: Sergeant, where will be start from here --

Q In response to Mr. Weitz' question, you said there were two girls who came over to speak to you about something that occurred to them. Is that right?

A They didn't come over to me. I was on patrol and they flagged me down.

THE COURT: You tell us, Sergeant, in your own words, and be as specific as you can, as to who did what and who said what, in your words what occurred.

THE WITNESS: I was on patrol in the parking area of the Coliseum. I had just left one patrol-

man I had stopped to speak to. And as I was proceeding in a westerly direction towards the Coliseum down one of the aisles used for the cars entering or leaving, I observed two young girls I would estimate to be in their teens, were running in the aisle. They were running toward me. When they apparently observed my car coming they started to wave and shout to me.

I pulled the car up and stopped. I asked them what was the matter. And they said --

MR. WEITZ: If your Honor please, I object to "they". Either one or --

THE WITNESS: The two girls were very excited. Both were speaking at once. And from their conversation they told me that one of them had just been grabbed by a young man and he had attempted to pull her between some of the parked autos in the parking lot.

I asked the girls where the man was now. And they pointed in a northerly direction and said about three aisles over.

I then got out of the car and looked over in that direction to see if I could see anyone.

I then got back to the patrol car. I told

the girls that I was going over to see if I could find him and to follow me.

I then proceeded to the end of the aisle, made a right turn and went over to three aisles and turned into the aisle.

As I turned into the aisle I observed one male walking in an easterly direction.

MR. WEITZ: If your Honor please, I submit he answered the question as to the conversation. And that was all that was asked.

THE COURT: All right.

MR. WEITZ: Thank you.

Q Now, when the girls told you that the man or the male was three aisles over, did they indicate to you in any manner the way in which he was dressed?

A They indicated he was wearing a T-shirt.

Q Anything else?

A That's all that I recall.

Q And after you told the girls to follow you -- by the way, they were on foot?

A When I first observed them, they were running down the aisle, yes.

Q Now, after you went down to the three aisles where the girls had pointed and you went into that aisle

and you saw this one male, from that point on tell us in your own words, Sergeant, what you saw, what you observed, what the sequence of events was and not only as to what you were doing, but the other person may or may not have been doing.

A As I turned into the aisle I observed the male was approximately 300 feet down from the end of the aisle. I proceeded down and brought the car to a stop approximately six to eight feet in back of the individual.

I then opened the car door and got out. As I got out I called to the male to stop, that I was a police officer and that I wanted to talk to him.

The subject kept walking eastbound. He either was unable to hear me or having heard me didn't intend to comply with my request.

MR. WEITZ: Objection.

THE COURT: Well, you read that to him yourself.

MR. WEITZ: Pardon, Judge?

THE COURT: You read that to him yourself.

MR. WEITZ: I didn't read that he didn't intend to comply with his request. I read something different. And I will be glad to read to the Court the exact phrase.

THE COURT: All right.

Disregard that.

MR. WEITZ: Thank you.

THE COURT: Go ahead.

THE WITNESS: I then asked the subject to stop and then again identified myself as a police officer and received no response or indication from the man that he was going to comply.

Q I will stop you for a moment here and then I will let you continue.

What was your intent? Why were you calling this person to stop and what was your intent when he did stop.

MR. WEITZ: Objection.

Q What was your purpose in asking that gentleman to stop?

MR. WEITZ: Objection.

THE COURT: No, I will allow it. You asked it on, quote, direct, unquote.

A My intention was to inquiring and investigating as to the situation I had just been informed of.

Q Well, did you arrive at a -- did you have a frame of mind after the girls had told you that someone had grabbed one of them and attempted to pull them into

the aisle or between cars? Did you have any impression in your mind as to whether or not a crime had been committed?

MR. WEITZ: Objection.

THE COURT: You may answer it.

A I did know a crime had been committed.

Q Is that as a result of the conversation with the girls?

A I had reasonable ground to believe from what the girls told me that a crime had been committed.

MR. WEITZ: Objection.

THE COURT: I will allow it.

Q Having that reasonable ground to feel a crime had been committed, was it one of your purposes to interrogate that particular person to ascertain what involvement, if any, he may have had with the discussion -- with the incident the girls had related to you?

A That's correct.

Q And would you pick it up from the time, Sergeant, please, in your own words where you told him to stop and he didn't stop and you told him again to stop and he didn't stop, what you did and everything that occurred as to your best recollection.

A I then left the vicinity of the patrol car and I

proceeded after the individual who was still proceeding eastbound. I overtook him. I placed my left hand on the upper part of his right arm. I told him I would like to speak to him, to please return with me to the police car, patrol car.

At this point the subject turned around and began to walk in a westerly direction towards the patrol car.

As we were walking and we were approaching the patrol car, we got within a short distance of it and suddenly the subject became very violent and started screaming, started ranting and raving and things I could not understand.

At the same time he swung around and struck me. I then fell backwards landing on my hand and knees. And the subject then came down on top of my back.

The force of him coming down, we rolled over. He began jumping, screaming, scratching.

At this point I tried to defend myself and I reached for my jack which was in this here pocket.

I took it out and I struck the individual on the side of the head. He gave no indication of even feeling the blow.

He then reached up and grabbed the jack and ripped it out of my grasp. What happened to the jack from this

point on, I am not aware of.

We then continued the scuffling and fighting.

Q Wher you say scuffling and fighting, would you describe as best as you can recall what was happening. Were you on the ground at this time?

A I was on the ground and trying to get to my feet and my knees. I was trying to ward off his blows. I was trying to subdue him with whatever force I had.

We were constantly changing positions on the ground. We finally ended up where he was behind me with his arm around my chest and stomach area holding me from behind. I then placed my hand onto his wrist in an effort to prevent him from using his full force by squeezing.

Q Were you both on the ground at this point?

A We were on our knees, sir.

At this point a car entered into the aisle proceeding in an easterly direction. When it came abreast of my patrol car it stopped. My patrol car door was open and the subject and myself were on the ground blocking the, half of the aisle.

I observed there were two females in the car. I called. One of the girls on the passenger side opened the door and I then asked her to go to my patrol car and to use the radio and request assistance.

While we were on the ground and we were fighting and wrestling there were people passing by in the other aisles. I called to them for help, but no one stopped. They just kept going.

MR. WEITZ: If your Honor please, I don't know now if he is going back in time or forward in time or simultaneous. Can we have that straightened out as to when he alleges he was calling to other people in other aisles?

THE COURT: Was this prior to the time the girls arrived?

THE WITNESS: This was prior to and at the same time the girls were there.

THE COURT: All right.

THE WITNESS: The girls -- the girl I was speaking to informed she didn't know how to use the radio. I told her where it was located and I informed her there was a microphone with a button on it. And I told her she would have to depress the microphone button and then request a signal 14 at the parking field of the Coliseum.

Q Let me interrupt you again and then I will let you continue, Officer.

Sergeant Sehlmeyer, while you were both rest-

ing on the ground, during all that period of time, did this other individual continue fighting or did there come a time when he calmed down?

A He would calm down from time to time. But each time I tried to move or to make an attempt to get up, he would then tense up and become loud. So I determined the best situation would be to try to calm him by speaking to him, by telling him I was a police officer. And that if I remain calm I may be able to keep him under control until assistance arrived.

Q Did he give any response to these attempts to calm him, these discussions you were having?

A He made no reply. But as I say, if I remained calm he seemed to be calm also. The only time he seemed to become violent or start screaming again is when I made a move.

I told the girl how to operate the radio and I told her to request a signal 14 at the Coliseum. And I told her to use the car number on the side of the car.

She then came back to me and said -- not physically came back, but she spoke to me and said they are requesting to know a better location.

I told her to tell them it was in the parking field

on the east side of the Coliseum. I also requested that she turn on the revolving red dome light on the top of the police car. I told her it would be activated by a white button on the left-hand side of the steering column.

She apparently tried to find the button and said she was unable to.

And again I told her it was a white button on the left-hand side of the columns. And she said she was unable to find it.

And I realized later the reason for this. Previously I have been driving a different patrol car --

MR. WEITZ: If your Honor please, I will object to the operation of his mind.

THE COURT: Yes. Strike that out.

THE WITNESS: At this point the subject had quieted down and had become docile. I had received an impression from the girl that she was having trouble with the radio and she was unable to locate the dome lights which would have marked my location.

So I decided to try once again to get up with the subject. And I did. He didn't resist.

As I got up to my feet he got up on his feet

behind me. At this point, or shortly thereafter, the girl exited my patrol car.

He then swung around and I put a hammer lock onto the subject and started to walk toward the patrol car for the purpose of handcuffing him and then determine whether the radio message had in fact been received and to turn on the red light to direct help, if it was coming.

As I again approached the police car, suddenly the subject became extremely violent again.

Q Since you were there, tell us what you mean when he became violent. Tell us what happened to you.

A He started hollering and started screaming. He spun around. I lost my grasp on him. I started to lose my balance.

MR. WEITZ: If your Honor please, he was asked to describe what he meant by the word "violent".

THE COURT: No, I will allow that. I will allow this answer.

MR. WEITZ: If your Honor please, may I --

THE COURT: I will allow the answer.

MR. WEITZ: I move to strike the word "holler" and "scream", if it now --

MR. GARDNER: I would like to know if there

was anything else he meant, Judge.

THE COURT: He said what he meant.

Go ahead.

THE WITNESS: He became uncontrolled. He then turned and ran the remaining distance to the police car and got behind the steering wheel. He again began to push down on the accelerator.

Q That's the gas pedal?

A The gas pedal.

Q Let me stop you for a minute.

That particular automobile, was that automatic or shift?

A Automatic, sir.

Q When you say automatic, you left it in park?

A It was left in park.

Q The engine was running?

A The engine was running.

Q When this individual jumped in the car after you lost control of it, you say he was pressing the gas pedal?

A Yes.

Q And if that lever were pushed down in drive, what would happen to the car?

A The car would take off at full speed.

Q How many people were approximately in the area? Can you tell, at that time?

MR. WEITZ: If your Honor please, this area --

MR. GARDNER: Withdrawn.

Q Were you aware at the time that this individual was pressing down on the gas pedal of the car, a hydro-matic, that the car would go forward if the lever was moved? Were you aware at the time there were people in the area?

MR. WEITZ: I will object to "in the area."

THE COURT: In the aisle.

I will allow it.

Any people in the aisle?

THE WITNESS: I do not know, sir. I didn't observe any people in the aisle at the time other than the girl who had already stopped and I had observed some passerbys who continued up the aisle who didn't stop.

Q By the way, are those cars used for people who are parked in, who may want to get back into the car after they were leaving the Coliseum?

A I don't understand.

Q Were those people in the concert who could leave and pick up the cars any time they wanted to?

A It's the traffic portion and the entrance and exit for the automobiles.

Q When this individual was in this hydromatic car pressing down on the accelerator, did he just press down once? Or you tell us.

A From the sound of the engine, he had pressed it completely to the floor and was holding it right there.

Q Could you hear the noise?

A Yes.

Q Smoke coming up?

A That I was not aware of, sir.

Q Go ahead.

A At this point I went to the door, reached in with my left hand to turn off the engine and remove the keys.

Q Did you have to lean into the car to do this?

A Yes, I did. As I was leaning in I felt movement on my right side, my holster moved. I felt tugging. At that point I placed my right hand on my gun in an effort to safeguard it.

I then stopped going for the keys and began to struggle with Mr. Haber.

MR. WEITZ: If your Honor please, the word "struggle" --

THE COURT: You asked him at length as to

this aspect of it.

MR. WEITZ: Can he describe it?

THE COURT: Struggle is clear enough.

MR. WEITZ: Yes.

THE COURT: When you say "struggle", did you each have your hand on each other or did only one have the hand on the other or both? What was the situation?

MR. WEITZ: Thank you, Judge.

THE WITNESS: My right hand was on my gun. My left hand was going to strike Mr. Haber. His hands were flailing, going in all directions. I couldn't say precisely where they were at any particular time, except that I could feel one of his hands, which one I know not, at my gun and holster.

Q There came a time after you felt that tugging at your gun and holster that the gun ultimately came out of the holster. Is that right?

A That's correct.

Q And following I think you indicated in response to Mr. Weitz there was a struggle for the gun the way you described.

Could you tell the jury the best you can what occurred with respect to the possession of the gun,

whether you had possession all the time or he had part or you had part. Just tell us what you best remember.

A We were still in the car immediately after the gun had been drawn from the holster. At one point I gained complete control of the weapon. At this time I used it to strike George Haber in an effort to subdue him. But the blows that I administered seemed to have no effect on him at all. It did not deter him from fighting, scratching or any of the other efforts he was engaged in. The struggle ensued then with both of us fighting for possession of the gun again.

I then started to withdraw from the car and George Haber while continuing to struggle for possession, came out of the car and we were both then on the left-hand side.

The struggle continued in a rear motion down the left-hand side of the car, both of us fighting for the weapon.

At a point about the rear left door I heard a loud report which I would acclaim to a gun shot, although I felt no recoil and I saw no muzzle flash.

We then continued grappling, fighting. I was using everything that I possessed, as far as strength, knowledge, to retain sole possession of the gun. I was

unable to.

The struggle continued in the rear of the car and then across the back towards the center of the trunk.

As we got to what I remember to be the center of the rear of the car, about the center of the trunk while we were still struggling and fighting for possession of the gun, the gun discharged a second time. At this point George Haber seemed to relax and then dropped to the ground.

I then walked back to the left-hand side of the car and started up towards the rear door and realized that my physical energy had just about been spent.

MR. WEITZ: I couldn't hear that, your Honor.

THE COURT: I realized my physical energy was just about spent.

THE WITNESS: At this point I leaned against the left rear fender of the car. I then remembered seeing red lights approaching from numerous directions. An unmarked car pulled into the aisle opposite to where I had been standing and stopped. A man identified himself as a member of the Crime Prevention Unit. He told me to put my weapon back into my holster.

At this point, as I was returning it, I real-

ized that the hand grips were missing.

I put the weapon in this holster. He then told me to go and sit in the back of his car.

Q Sergeant, can you tell us approximately how much time there was between the time that you felt that tugging on your holster and the time that that second report went off? In other words, how much time the struggle was going on for the possession of that gun?

A I don't feel --

MR. WEITZ: Objection to the form of the question, your Honor.

THE COURT: Leave it without the possession of the gun; how much time the struggle was going on.

MR. GARDNER: All right.

How much time was the struggle going on?

A I am hesitant to make any estimation at all. During this time I am not aware of the lapse of time.

MR. WEITZ: Your Honor, anything other than that --

THE COURT: I will allow it.

Q During that period of time, whatever it was that the struggle was going on, do you know at every precise moment during that struggle where your hands

were with reference to the gun and where Haber's hands were with reference to the gun?

A No, sir.

Q During that period of time did you feel that there were some points in the struggle when you were losing control of the gun?

MR. WEITZ: Objection.

THE COURT: I will allow it.

A I felt there were points where I lost total possession of the gun.

Q And would it be a fair statement to say, Sergeant, during the course of the struggle there were times you had possession and times he had possession and times you were both attempting to get possession?

A Yes.

MR. WEITZ: Objection, your Honor.

THE COURT: Overruled.

MR. WEITZ: Would it be a fair statement?

THE COURT: Yes.

MR. WEITZ: That form is permissible?

THE COURT: This is cross-examination.

MR. GARDNER: If your Honor please, I know with the Court's time, I will be somewhat lengthy and I have the other issue. Is this an appropriate

time to stop, if the Court agrees? I say it only because I know some people have to make it over the [illegible]e.

THE COURT: Over what bridge?

MR. GARDNER: Some people have to go over the Brooklyn Bridge and it's a fight to get over it.

MR. WEITZ: Try the subway.

THE COURT: I have a sentence panel at 4:30. We will not be wasting too much time, ladies and gentlemen. I will see you tomorrow morning at ten o'clock.

Don't discuss the case.

(The jury leaves the courtroom and the following takes place out of the presence of the jury:)

THE COURT: Now, Mr. Weitz, as far as your objection that this was a loaded question, I have only gotten about five pages through, but there is a narrative beginning on page four and running through page eleven.

MR. WEITZ: Yes, Judge. I know.

THE COURT: Which is a complete narrative of what was happening there.

MR. WEITZ: May I, your Honor, and I don't

mean to be disrespectful, but it's like a red flag when you say it's a complete narrative of what happened. It's really a complete narrative of what this man says happened, Judge. That's why I get a little disturbed.

THE COURT: But you said he was putting words in his mouth, which is really not quite right.

But, in any event, maybe one or more of you can give me a --

MR. WEITZ: I can't hear you, Judge.

THE COURT: Maybe one or more of you can give me some authority as to this question about asking of rights in a civil action. It seems to me it's not pertinent.

However, let me ask the sergeant -- maybe I better not ask the sergeant.

MR. WEITZ: Couldn't we know if he testified in the Grand Jury, too?

THE COURT: He has rights, too. The defendants have rights.

MR. WEITZ: May we go off the record for a moment?

THE COURT: They may object to that question.

MR. WEITZ: The last case I tried I heard a

lawyer say that not even defendants have rights. I am not depriving him of any rights, if it's of any relevance to the Court. That's all.

THE COURT: I am afraid in a plaintiff's case one sometimes thinks that the defendant has no rights and one must think that the defendant may have some objections to the question you or I might want to ask.

MR. WEITZ: I understand, Judge. And that's why I said in the Court's discretion whether it might be asked.

THE COURT: I think in my discretion I better leave it up to Mr. Gardner.

MR. GARDNER: What is that?

THE COURT: As to whether he appeared and testified before the Grand Jury.

MR. WEITZ: We have no objection to that question being asked.

THE COURT: All right.

Did you appear and testify before the Grand Jury?

THE WITNESS: Yes, I did.

THE COURT: Well, I suppose it presupposes how much this jury really knows about a person who

testifies before a Grand Jury and whether -- I assume you're going to object to this question. I am assuming you were not granted any immunity.

You're shaking your head in the negative.

THE WITNESS: No, sir.

THE COURT: If all of this comes out and the whole Grand Jury question has come out by prior questions asked by you --

MR. GARDNER: Excuse me, your Honor. Since you were addressing your comments to me before when you said questions of the Grand Jury were coming out by questions by you, your Honor was looking at Mr. Weitz and your Honor is correct, your Honor. He asked that question of Patrolman Fehn.

MR. WEITZ: No. I asked a question which elicited --

THE COURT: Several questions.

MR. WEITZ: Yes. And there was an answer in which the patrolman mentioned the Grand Jury. I was not looking to bring that before the jury because it raises all kinds of collateral matters which should not be in a civil lawsuit. It becomes a major problem.

MR. GARDNER: But the defense didn't raise it, your Honor. And the inference was raised by the plaintiff. He asked what the purpose was. And one of the purposes was it presented to the Grand Jury and he got his answer, your Honor.

THE COURT: It depends on how much law they know or don't know. If he wasn't advised of his rights and questions were asked of him, he may have been -- and the indictment returned against him may have been dismissed on that ground.

MR. WEITZ: We have a converse of that whole question right here in that question, your Honor. If not, I will not discuss it in riddles. I will discuss it in a memo to the Court.

THE COURT: It's a difficult question. At the moment I am inclined to let you ask about the question of rights, but I am not sure I won't be damaging the defendant's case.

MR. GARDNER: We can research this overnight and come back with whatever applicable law there is in the interim, your Honor.

I have one further question, your Honor. I asked Mr. Weitz to anticipate when his case will be over because I am having difficulty in sched-

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uling some people. I have some people who have to come in from out of town. And I am not asking him to commit himself other than give me a general idea.

MR. WEITZ: I thought I would be finished today, Judge. I have had people here every day this week. I thought I would be finished today. I work at a slower pace than I thought and I expect I would be finished tomorrow. And I don't mean at 4:30 tomorrow, I expect I would be finished during the day tomorrow.

MR. GARDNER: I will be guided accordingly, your Honor.

Thank you.

THE COURT: How long are you going to be? Do you have any idea?

MR. GARDNER: I beg your pardon?

THE COURT: How long will you be?

MR. GARDNER: Three days. I anticipate I will be at maximum three days and hopefully shorter. But I can't guarantee on the cross-examination.

THE COURT: Maybe we will get finished about Tuesday of next week, won't we?

Let me have your requests to charge as soon

as you can.

MR. GARDNER: Yes, Judge.

MR. WEITZ: All right.

(Case on trial adjourned until Wednesday, May 6, 1976.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

HABER,

Plaintiff,

- against -

NASSAU COUNTY,

Defendant.

- - - - - - - - - - - - - - - - - - - x

73C1408

United States Courthouse
Brooklyn, New York

May 5, 1976
9:30 o'clock a.m.

B E F O R E :

HONORABLE THOMAS PLATT, U. S. D. J.

HARRY RAPAPORT, CSR
Acting Official Court Reporter

A P P E A R A N C E S :

HARVEY WEITZ, ESQ.,
Attorney for Plaintiff

JOHN GARDNER, ESQ.,
- and -
BARBARA BILLAVER,
Of Counsel
Attorneys for Defendant

(The following takes place out of the presence of the jury:)

THE COURT: What do you have to show me?

MR. GARDNER: If you recall yesterday, if your Honor please, an issue was raised as to the initial portion of the question and answer statement of Sergeant Sehlmeyer on October 2nd, '72, to the Assistant District Attorney concerning those questions relevant to advising him of his rights and his response of consenting to waive any immunity he may have.

We made a judgment, your Honor, that we will not read that portion of it and we will commence the statement on page four, which follows the discussion relevant to the immunity and relevant to waiving those rights.

THE COURT: You are not going to press the point?

MR. GARDNER: I will not press the point.

THE COURT: All right.

Bring the jury in.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury:)

THE COURT: Sergeant Sehlmeyer, do you want to take the stand again, please.

R O B E R T H. S E H L M E Y E R, previously sworn, resumes the stand and further testifies as follows:

THE COURT: Good morning, ladies and gentlemen. Sorry about the delay. I had a Grand Jury motion I had to take precedence over this.

MR. WEITZ: If your Honor pleases, may I just -- instead of objecting as each and every question is read, can I object now to each and every question that is not in explanation of page fourteen, or will I be required to get up?

THE COURT: I thought the only objection you had was to page three.

MR. WEITZ: No. I think I indicated to the Court there were some questions as to form I had objections to, and also anything that does not relate to the materiality that I read directly to this witness.

MR. GARDNER: It's my posture, if your Honor please --

THE COURT: I think it all relates to the question you asked.

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MR. WEITZ: I understand.

That was Mr. Gardner's posture --

THE COURT: Well, certainly beginning on page four through page seven, which is about all I got a chance to read, that's all a full description and based on -- and I will allow that based on the question you asked.

And after that, if you want to make a specific objection, it looks like probably up through about --

MR. WEITZ: Page eleven, Judge, I think that answer goes all the way through page eleven.

THE COURT: It goes right on through eleven, twelve --

MR. GARDNER: It's my intention to read the entire question and answer, if your Honor please, right up to and including the question and answer and the series on page fourteen prior to the ones that Mr. Weitz chose to read.

THE COURT: What about the beginning of page seventeen to the end, or seventeen through nineteen anyway? Do you think that's out?

MR. GARDNER: I will ask him about that. I don't have to read it.

THE COURT: You can ask him about that di-

rectly.

MR. GARDNER: Yes, I can ask him about that directly.

THE COURT: Certainly that part is not related to what he read.

MR. GARDNER: Yes, your Honor.

So I will go from four up to -- up to seventeen.

THE COURT: Do you have any objection to that, Mr. Weitz?

MR. WEITZ: I only have an objection, if your Honor pleases, to page fifteen, to the question on page fifteen, on the ground that they are leading and suggestive and actually the District Attorney was putting words in the witness' mouth rather than the witness testifying. It's on page fifteen, Judge.

THE COURT: Yes, I understand that. But you asked questions about that precise question.

MR. WEITZ: I understand that, Judge.

THE COURT: I will allow that.

MR. WEITZ: I wanted my record protected so I don't have to get up and down.

CROSS-EXAMINATION (continued)

BY MR. GARDNER:

Q Sergeant, let me ask you directly first, after this incident you were taken to a hospital, were you not?

A Yes, sir, I was.

Q Would you tell the gentlemen and the ladies of the jury what injuries you felt, just basically how you felt about your body, if anything hurt you, or what it was you were having difficulty with that required you going to the hospital at that time following the incident?

A After the incident when I arrived at the hospital I was completely spent physically. I was suffering pain in my back, in my ribs. I was suffering pain in my hip and left leg. I was cut and bruised about the face and hand, the upper part of my body. My ribs were particularly sore. And the major part of my pain was in the back and hip and left leg area.

MR. GARDNER: If your Honor pleases, I will commence to read from the question and answers that were asked by Assistant District Attorney Frank P. Dillon of Sergeant Robert H. Sehlmeyer in the District Attorney's Office at 262 Old Country Road, Mineola, New York, on October 2nd,

1972.

"QUESTION: All right.

"Now, Sergeant, on September 29th, which was Friday, can you tell me what tour of duty you were working?

"ANSWER: I was working the 3 P.M. to 11 P.M. tour of duty.

"QUESTION: And were your duties supervisory in nature?

"ANSWER: Yes, I was a supervisor for Highway Patrol.

"QUESTION: And where were you stationed?

"ANSWER: I -- I work out of Mitchell Field and I cover the entire county.

"QUESTION: Now, on this particular evening were you at eleven o'clock p.m. on duty in the parking field outside the Nassau Coliseum?

"ANSWER: Yes, sir, I was.

"QUESTION: From eleven o'clock on, approximately 11:10 did something occur, something that came to your attention?

"ANSWER: Yes.

"QUESTION: Would you tell us what that was?

"ANSWER: I was in the parking field. I had

just spoken to one of the patrolmen assigned to the detail which I was covering and I was enroute to speak to the other men assigned when I observed two girls running from between cars as I proceeded westbound in one of the parking lanes.

"They flagged to me and I stopped. The girls told me that they had just been grabbed by a man in the parking field and I understood them to say that he had tried to drag them between or had tried to drag one of them between cars.

"The girls pointed the man out to me, said he was three rows over. I saw a man standing there. I told the girls I would go and stop the man and to follow me over.

"I then drove the police car over to the third aisle and as I entered the aisle I observed there was one man walking eastbound in the aisle. I pulled the patrol car up in back of the man, got out, told the man to stop. Paid no attention to me, continued walking.

"I identified myself and told him to stop again. I received no reaction from him. He just continued to walk.

"I then ran up to him, took him by the arm.

He accompanied me without any hesitation, without saying a word. We turned around and started back towards the patrol car. As we approached the patrol car, the man became extremely violent, swung around and struck me.

"As I was struck and as I tried to back up, I slipped and fell, partly because of the blow and partly because of slipping. And as I went down I could feel this man come down on top of me.

"QUESTION: Did you land forward or backward as you fell?

"ANSWER: I landed forward. I landed face down.

"QUESTION: When he came down on top of you then, where was he? On your back?

"ANSWER: He was on my back. I don't know whether he fell or jumped or dove at me. I don't know.

"I rolled over and he rolled with me. I went to get up and he again punched me. I went to get up again and as I did I took my jack from my back pocket and I struck the man, I believe, on the side of the head. He gave no indication of being hit. He made no reaction.

"He reached up and grabbed the jack and tore it out of my hand. I had the thong and he had the rest of it in his hand. He made one swipe at me with it and missed. And what happened to the -- to it afterwards, I have no idea.

"He then grabbed me from behind. I was on my knees and trying to get up. And he was in back of me. He had both arms around me, just in the chest area.

"QUESTION: Excuse me. Did he have your arms pinned at that time?

"ANSWER: No, no. He -- his arms were under my arms. I grabbed one wrist with either of my hands to try to prevent him from putting too much pressure on me.

"We were there for a short period of time when all of a sudden he relaxed, he stopped struggling. And I was calling for the people passing by in either aisle to come and help me, but they just looked at me and walked away.

"About this time a car approached the aisle that I was in, occupied by two girls. They stopped approximately parallel with my vehicle. I called to the girl.

"I asked her to please go to my car. I told her to use the radio and call for help. I gave her instructions as calmly and as quietly as I could because every time I made a movement, it seemed to aggravate the man I was struggling with.

"I told her to take the microphone and to -- to press the switch on it, tell them it was signal 14. I told her it was car 2254.

"I told her to tell them that we were in the parking field of the Coliseum on the south side. And at this time I was on my knees still with the man in back of me holding on.

"The girl called back to me and said that they were requesting a better location. At this point I figured if they didn't understand her, I would have to make an attempt to go to the radio. I started to get up and the man got up with me. As I got to my feet I put an arm lock on the man and we both walked to the police car. He offered no resistance.

"The girl gave me the microphone through the door. The door was open at this time. I gave them a location on the radio. The girl asked if she could do anything else. I asked her to put her

name on the pad on the car seat.

"All of a sudden this man became violent again. He broke loose from me. I don't know how, but he became extremely violent. I lost control of him.

"He went to my car, jumped in, and was mumbling something to the effect that he'll get them all, or I'm not sure of the exact words.

"He started racing the engine and -- but he didn't put the car into gear. He just kept racing and racing the engine. At this point I reached into the car with my left hand to remove the car keys and as I did I felt him go for my gun.

"When he went for my gun I also went and I grabbed it and a struggle ensued. Somehow during the struggle, I don't know how, the gun came out. I recall having it in my hand. I recall he had it in his, partly in his possession.

"At this time I struck him a number of times with my left fist, that I'm sure of. I think I might have possibly struck him with the right also during the struggle. He was swinging at me. He was attempting to take the gun out of my possession.

"I don't -- I didn't have full control of -- of my right arm or hand without being restricted

by him. I then backed up. He came out of the car with me, still swinging at me, still trying to get the gun. As we struggled I heard the gun go off. I felt no sensation of the gun. I saw no flash; just the noise.

"We continued to struggle again. About this time I recall grabbing him by the hair. We struggled towards the rear of the car, around toward the back. All I could think of was that if he ever got the gun I was dead. I had no doubt in my mind that that was his only purpose of going for the gun.

"We struggled some more in the rear of the car. I heard the gun go off again. Again I felt no sensation. I saw no flash. Next thing I recall, the man was lying on the ground and I was going over to the back of the police car where I leaned against it.

"By this time assistance was -- was arriving. Someone called to me a number of times to put my gun back in my holster. And as I put it back I realized that the hand grips were missing from the gun.

"I observed a car stopped next to the patrol

car and someone told them to move on. Then someone else called, 'Did anyone call an ambulance?'

"I was helped back to an unmarked car where I was placed in the back seat and taken to Nassau County Medical Center.

"QUESTION: Now, Sergeant, we have a few questions. While you were on the ground, were you on your knees, did you say?

"ANSWER: I was on my knees part of the time.

"QUESTION: And this man had his arms around you?

"ANSWER: Yes, sir.

"QUESTION: And you were holding his wrist and was he trying to hold you tightly at that time?

"ANSWER: At first he was. He tried to apply pressure. And then all of a sudden his, he just relaxed. And the only time that he tensed up was if I tried to move.

"QUESTION: As you would attempt to move then and alter the situation, he would again tighten his grip?

"ANSWER: Right, yes.

"QUESTION: Now, while this girl was in the car, the one who came by and offered her assist-

ance --

"ANSWER: Yes.

"QUESTION: -- did you instruct her as to trying to locate a dome light?

"ANSWER: Yes, I -- I had told her that there was a light switch on the lower left-hand section of the dashboard.

"I had told her there to pull the switch down which would turn on the flashing red lights on top of the car to direct the assistance to us.

"She told me she couldn't find it. I kept telling her it was a white switch, it was to the left of the steering column."

THE COURT: I will sustain counsel's objection to the next sentence or paragraph.

MR. GARDNER: All right.

THE COURT: And the next two paragraphs also, so you go down to the middle of the page.

MR. GARDNER: Yes.

"QUESTION: And you didn't know quite where the switch was in this car?"

THE COURT: Strike that question.

MR. GARDNER: All right.

The next question, your Honor?

THE COURT: Yes, that's good.

MR. GARDNER:

"QUESTION: Now, when you reached into the car after this man broke away from you and he jumped into the car and he was revving the motor --

"ANSWER: Yes.

"QUESTION: -- you stated that you reached in with your left hand. Will you tell us, please, why you used your left hand?

"ANSWER: Because if I would have used my right hand I would have had to put my back to -- to this man and I would have to put myself in jeopardy. The only way I could continue to face him would be by using my left hand."

MR. GARNDER: If your Honor please, I am on page fourteen now and I will go through the complete page fourteen.

"QUESTION: As you realized -- "

MR. WEITZ: And you.

MR. GARDNER: Yes.

"QUESTION: And you realized, of course, that he was violent. Is that one of the reasons, of course, why you wouldn't put your back to him? Is that right?

"ANSWER: Right, sir.

"QUESTION: Now, as you were inside, as he was inside the car and you felt him at your gun --

"ANSWER: Yes, sir.

"QUESTION: -- you then put your hand over by your gun. Is that right?

"ANSWER: Yes, sir.

"QUESTION: And when the gun came out, you had it in your right hand?

"ANSWER: When the gun came out it was in my right hand; yes, sir.

"QUESTION: Do you remember how you were holding it?

"ANSWER: No, sir, I don't. I assumed it was by the handle, but I couldn't say for sure. I know I had it in my hand.

"QUESTION: Now, when you went on duty that night, the last time you noticed your gun before this incident, the grips were in place, were they not?

"ANSWER: Yes, sir, they were.

"QUESTION: Now, when you had your gun in your right hand, I believe you said that you didn't -- that sometimes he had the gun partly in his pos-

session. What did you mean by that?

"ANSWER: I meant we were fighting for it and I -- I couldn't really use that hand, that arm or the gun because of his grip.

"QUESTION: He at some time, in other words, he either had your right hand, he had his hand on your hand or your wrist or some part of that gun?

"ANSWER: Yes.

"QUESTION: In his effort to try to take the gun away from you. Is that right?

"ANSWER: That's right, sir.

"QUESTION: Now, when the gun discharged when you were by the left rear portion of the vehicle you say that you felt no sensation. What did you mean by you felt no sensation?

"ANSWER: I felt no sensation that I would associate with a gun going off.

"QUESTION: In other words, you didn't feel the gun kick, is that it?

"ANSWER: I didn't feel the gun kick, no, sir.

"QUESTION: Now, did you notice at that time that the glass went out?

"ANSWER: No, sir.

"QUESTION: In the left rear?

"ANSWER: No, sir.

"QUESTION: You did notice that at that time?"

MR. WEITZ: No. You didn't notice it.

MR. GARDNER: Yes.

"QUESTION: You didn't notice that at that time?

"ANSWER: No, sir.

"QUESTION: While all of this was going on from the time that you first went over to speak to this young man up until the time that the second shot was fired, did you see any other police officers in your immediate vicinity?

"ANSWER: No, sir. There were -- there were none that I could see, sir.

"QUESTION: And the reason that you asked the young lady for assistance was because you wanted to bring other police officers to the scene. Is that correct?

"ANSWER: That is correct."

Your Honor, that completes the reading your Honor permitted.

Q Sergeant Sehlmeyer, I recall I asked you yesterday from the time you gave your response -- withdrawn.

You gave these answers to these questions to

the Assistant District Attorney on October 2, 1972, some two days following the incident. Is that correct?

A That is correct, sir.

Q And from the day you gave those answers did you ever see any transcript of those questions and answers?

A No, sir, I never have.

Q And did I or anyone from my office or anyone in the world ever give you a copy of this transcript or did you ever hear it reread until the moment you just heard it read from the stand?

A Just the parts read to me yesterday by the other attorney.

Q You're quite correct, other than the questions asked by Mr. Weitz the other day on page fourteen, prior to the other day have you ever seen or have read to you this transcript?

A No, sir.

MR. GARDNER: Nothing further, your Honor.

REDIRECT EXAMINATION

BY MR. WEITZ:

Q Sir, you have been in court since Monday. Is that correct?

A Yes, sir.

Q And you sat at counsel table since Monday?

A Yes, sir.

Q And during that day you came in about nine o'clock in the morning, did you not?

A A little later than that on Monday.

Q Pardon?

A A little later than that on Monday. It was almost 9:30.

Q You sat down and started reading some papers, did you not?

A I did read some papers, yes.

Q All right.

But you're saying to the jury that your lawyer never showed you this testimony you gave?

A That is correct, sir.

Q Now, was it true and correct that you told the District Attorney that you did not feel a kick from the gun when it went off the first time?

A That is correct, sir.

Q And it does have a recoil, I think you told us that yesterday?

A Yes, sir, it did.

Q And is it true and correct that you told the District Attorney that you didn't feel -- didn't see any flame or flash when it went off the first time?

A That is correct, sir.

Q And the gun has a flash at night. You told us that, too.

A It has a flash every time it's fired, but it's mostly visible at night.

Q And you didn't see or hear the glass of the automobile shatter?

A Not that I was aware of; no, sir.

Q Had you taken any medication that night of any sort, sir?

A No, sir, I had not.

Q Do you take any medication such as tranquilizers --

MR. GARDNER: I will object, if your Honor please. First of all, it's not proper cross. There is no claim --

THE COURT: This is direct.

MR. GARDNER: There is no claim, if your Honor please --

THE COURT: It's a negative answer. He is bound by it and there is nothing to indicate otherwise. And I will allow it.

MR. WEITZ: Thank you, Judge.

Q Do you take tranquilizers or other nerve-type --

THE COURT: I will not take it on that basis.

Did you on or prior to September 22, 1972, were you taking tranquilizers on or about or prior to?

MR. WEITZ: Thank you, Judge.

THE WITNESS: No, sir.

Q Have you ever prior to this occurrence used such drugs?

THE COURT: I will not allow that. He may have taken it when he was fifteen years old.

MR. WEITZ: No,sir. May I say within a year prior to?

THE COURT: Yes.

MR. WEITZ: May I ask that, your Honor?

THE COURT: Yes, you may.

Q Within the year prior to September 29th, 1972?

A Would you include things like aspirin or bufferin?

Q No.

A No, sir, I haven't.

Q Officer, you were aware of your surroundings when this struggle took place, weren't you?

A I was aware that I was fighting for my life, yes, sir. And I was aware that I was in a parking lot of the Coliseum.

MR. WEITZ: If your Honor please, I asked about his surroundings.

THE COURT: Yes, I think you asked him that.

MR. WEITZ: I didn't think we were playing that kind of game, Judge.

THE COURT: It's not a game. I think it's a very serious thing.

MR. WEITZ: So do I.

I will reframe it, your Honor. Maybe the question was inarticulate.

MR. GARDNER: I object, if your Honor please.

THE COURT: He is attempting to reframe it.

Q Were you aware of your physical surroundings?

A Yes, sir, I was aware of my physical surroundings.

Q Now, Officer, yesterday when you testified you made no mention of that standing at the automobile and attempting to make a radio communication on a microphone, true?

A That's true, sir.

Q Yesterday you testified that this young man broke out of your grip as you walked toward the automobile. Isn't that true, sir?

A Yes, sir.

Q Now, Officer, the microphone that you use to make that transmission, that was inside your car, wasn't

that, sir?

MR. GARDNER: I object. I don't believe he said he made a transmission, your Honor.

THE COURT: Wait a minute. The microphone --

MR. WEITZ: I will reframe it. Can I withdraw it?

THE COURT: Let him answer the question.

MR. WEITZ: May I reframe it, your Honor?

THE COURT: Is the microphone a fixed object or on a cord that extended?

A It's on a cord, sir, that's coiled and it can be stretched back and forth like a telephone.

THE COURT: Like the little microphone on the Sony transmitter?

THE WITNESS: It's more like on a telephone.

MR. WEITZ: We may have a picture of it.

Q I show you Plaintiff's Exhibit 11 in Evidence, and does that show the microphone and the cord it is on?

(Handed to the witness.)

A Yes, sir, it does.

Q And that's where it's located in the automobile, on the console between the two seats. Isn't that so?

A That's where it's attached, yes.

Q And that's about the length of the cord, too, that shows the length of the coil and cord?

A It shows part of the cord, sir, yes; part of it is behind the console.

Q Officer, is that the microphone on which you attempted to make a transmission which your lawyer read today?

MR. GARDNER: I object to the question, your lawyer read. I read something which was a question and answer taken on October 2nd, 1972. I object to the form.

MR. WEITZ: I will rephrase it, Judge.

Q Is this the microphone that was referred to in the testimony that you gave in October of '72?

MR. GARDNER: October 2nd of '72.

THE COURT: October 2nd.

A Yes, sir, that is a picture of the microphone.

MR. WEITZ: May I pass it out?

THE COURT: Yes, of course.

(The photograph referred to is handed to the jury for their view.)

THE COURT: Go ahead.

Q And the left-hand door of your car -- the right-hand door of your car was closed when you left

that car earlier that evening? When you got out of that car earlier that evening to proceed after George Haber walking down the aisle, you got out of the driver's side of the car. Isn't that true, sir?

A Yes, sir.

Q And the right-hand door of your car was closed?

A Both the right-hand doors were closed, sir.

Q And you didn't open the right front door when you came back to the car, did you, sir?

A No, sir, I did not.

Q So when you went to the microphone you didn't approach it from the right front door of the car, did you, sir?

A No, sir, I did not.

Q And you went to this microphone at the left front door, didn't you, sir?

A We were heading for the left front door, yes.

Q And did you say that the girl gave you the microphone through the door?

A Yes, sir, that's what I said.

Q And did you say that the girl -- you told the girl to put her name on the pad in the car seat?

A Yes, sir.

Q And you're telling this jury you were at the

door, the girl was at the door and this man got into the car between you and the girl. Is that true, sir?

A No, sir.

MR. WEITZ: I don't have anything else, Judge.

MR. GARDNER: Nothing further, your Honor.

THE COURT: You may step down, Mr. Sehlmeyer.

THE WITNESS: Thank you.

(The witness is excused.)

MR. WEITZ: Call my next witness, sir?

THE COURT: Go get him.

S H E L L E Y B R A V E R M A N, was duly sworn and testified as follows:

MR. GARDNER: If your Honor please, I object. I don't know who this witness is. He was never disclosed and he is not set forth, as set forth in the pretrial order.

MR. WEITZ: He is a ballistics expert.

MR. GARDNER: I don't want speeches made to the jury.

THE COURT: Wait a minute. Let's come up here and take a look at the pretrial order.

MR. WEITZ: You want a side bar?

THE COURT: Yes, I do.

(The following takes place at side bar and

out of the hearing of the jury:)

THE COURT: Is your claim that you have listed this witness?

MR. WEITZ: No. In the pretrial order it says we would bring a gun expert.

THE COURT: Where does that say that?

MR. WEITZ: Right here, Judge. I am reading it upside down.

MR. GARDNER: It says gun expert, identify presently unknown and it would be provided prior to the trial. And it was not provided and it deprives the defendant of the right of discovery. And they have the right to amend at any time prior to the case going to trial.

MR. WEITZ: I didn't speak to this man prior to the weekend, Judge.

THE COURT: I am afraid I will sustain it.

MR. WEITZ: I appeal to the Court's discretion in this matter.

THE COURT: No.

MR. WEITZ: The man was sitting here two days. What prejudice is it to the defendant?

THE COURT: It may be, depending on his testimony. They may now want to have an opportunity

to get somebody to refute what he says. That's the purpose of pretrial disclosure, to prevent this kind of surprise.

MR. WEITZ: I think this becomes under these rules a game.

THE COURT: It does not become a game. Quite to the contrary. This is to take the game out of these rules. That's the purpose of these rules. If you're before Lloyd McMann or any of the judges in the Southern District, they would lower the boom on your head with a vengeance.

MR. WEITZ: I am not saying the Court is doing this. I am making an argument. I am not saying this personally to the Court. I am addressing my remarks to the discretion of the Court. I am asking the Court to consider that these rules are game-playing when we have a simple question of a man who is a ballistics expert, but we told the defendant we would be bringing a gun expert into court.

THE COURT: No, you didn't say that. You said identity presently unknown and you said such identification would be provided prior to the trial of of this action.

MR. WEITZ: We came up for trial so fast, it wasn't possible.

THE COURT: The defendant was perfectly within his rights and reason to say identity not having been provided, they don't intend to call such an expert. That's the purpose of it, to enable him to produce a --

MR. WEITZ: There was not time before trial. I didn't know the identity of this man until this weekend. We were on trial.

THE COURT: Then you haven't prepared your case properly.

MR. WEITZ: As I said and I want to say it for the record, I am not directing my remarks to the Court personally. I want the Court to understand that. I think this becomes game-playing on the part of the courts.

THE COURT: How can this be game-playing? How can Mr. Gardner, one, check this man's qualifications, his background; two, determine whether based on what he is able to determine in an investigation prior to trial, whether he wants to investigate various aspects in what he has done in other cases, and so forth; three, whether he

wants to call somebody who is going to offset his testimony, one or more experts; if you don't give him the appropriate information prior to the trial? That's the purpose of it. That's the purpose of listing the witnesses. That's the purpose of identifying people.

MR. GARDNER: And if I make that judgment as a result of investigation, I would require then to advise Mr. Weitz of any witnesses I intend to produce to give him the same opportunity.

It seems to me if the rules are followed appropriately, each party should have full and complete disclosure so there is no, quote, unquote, surprise witness at the last moment.

THE COURT: I had this precise problem on a case that involved the question of a seat belt expert where the defendant didn't reveal to the plaintiff that he intended to use a seat belt defense as a defense. And I violated the pretrial order and the result was what otherwise would have been a one week case was a four to five week case. It disrupted the calendar of this Court, ended up in a mistrial and it just raised havoc because the plaintiff's attorney claimed -- and I thought

it was considerable justification -- that he needed a continuance and he had to get his opposing experts and he had to have the adequate opportunity; and it was a nightmare. That's why we have this rule for.

MR. WEITZ: I understand that. And I wish to make my record as I can, and I am stating I am moving now for permission to amend the pretrial order to include this gentleman's name so that he may testify. I am addressing my motion in the interests of justice to the Court. I think the Court has the power so to do. The gentleman's testimony will be with respect to the technical aspects of this weapon, the weapon in the possession of the defendant. And when I say defendant, I mean in the plural, when the County of Nassau has prescribed, and if this man has anything to say about this weapon which is false or contrary to technical facts to rebut that from their vast -- and I don't mean to ponder -- their armamentarium. This is a Police Department and not a lawyer without resources.

THE COURT: It's an independent expert against an independent expert testimony which comes down

-- well, it's not quite that simple.

MR. GARDNER: May I suggest --

MR. WEITZ: I wanted my --

THE COURT: I always get the arguments in the interests of justice. And I submit the interests of justice are best served for adherence to the rules of law and that's why we have the rules of law.

As far as the operation of this gun is concerned, there has been considerable testimony already. I don't think this witness is going to add anything to that. I don't really see what he is going to add and I conceive of opinions that might well result in substantial prejudice to the defendant where he perhaps can't go out at this stage and get an independent gun expert to counteract it.

You had testimony from Sergeant Sehlmeyer and Sergeant Fehn as to the operation of this gun.

I am afraid I have to sustain the objection.

MR. WEITZ: I have an automatic exception, Judge.

(The following takes place in open court and in the presence of the jury:)

THE COURT: You may step down, sir.

Ladies and gentlemen, there are certain pretrial procedures and rules which the courts prescribe. And it's to obviate the -- what used to be the so-called surprise in a civil case.

And as you gather, it's not only surprise, but also during the course of pretrial preparation, and so forth. And when one witness has not fully complied with the pretrial procedures -- I mean one party has not fully complied with the pretrial procedures and produces a witness, it's not fair to the other side unless those rules have been complied with.

And in the case of the plaintiff, in all fairness to the plaintiff in this particular case, this was not willful or negligence in any way on their part. They apparently came across this witness in the last couple of days. But unfortunately under our rules they can't use him.

MR. WEITZ: Thank you, Judge.

May I call the next witness, Judge?

THE COURT: Yes.

Ladies and gentlemen, I should add not only in fairness to the plaintiff, but in fairness to

the dofendant. The witness who was just here was not a witness to the events in any way. So you haven't been deprived of any of that testimony. He was going to give you what is called expert or opinion testimony, which is quite different. He was not an eyewitness, so you are not being deprived of an eyewitness.

A L A N L O E F F L E R, was duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. WEITZ:

Q Sir, have you been subpoenaed to come to court here by my office?

A Yes.

Q And were you subpoenaed the other day and we couldn't get to you and you were told to go home?

A Yes.

Q And then were you resubpoenaed?

A Yes.

Q All right.

And, sir, would you tell this Court and jury how old you are?

A Twenty-one.

Q Where do you live?

A Massapequa.

Q And are you married?

A No, I am not.

Q And what is your occupation, Mr. Loeffler?

A Diesel mechanic.

Q I'm sorry, sir?

A Diesel mechanic.

Q Diesel mechanic?

A Right.

Q Mr. Loeffler, I am going to stand down here. I would like you to keep your voice up. I have trouble hearing you.

And would you please tell us, were you at the Nassau County Coliseum parking lot on the night of September 29, 1972?

A Yes, I was.

Q And would you tell us, were you on foot or in a car or what?

A In my parents' car.

Q What?

A In my parents' car.

Q Your parents' car?

A Yes.

Q And what were you doing there?

A A friend of mine got in a car accident. He was going to the Coliseum that night. Right before he got to the Coliseum, he got into an accident and I went with his brother to see if we can find the car and see if it was all right and for him to get home safe.

Q And while you were in the lobby, did you observe an incident involving a young man and a police officer?

A Yes, I did.

Q And were you on foot or in a car at that time?

A I was still in a car.

Q And do you recall in which direction you were traveling or what exactly you were doing?

A I was going towards the Coliseum.

Q Towards the Coliseum?

A Yes.

Q And were you traveling in an aisle as distinguished --

A Yes.

Q And were you the driver?

A Yes, I was.

Q And did you have your headlights on?

A Yes.

Q And were there lights in the Coliseum parking

lot as well?

A Yes.

Q Would you just in your own words be good enough to tell his Honor and this jury what you saw on that night.

A Well, I was driving down the aisle looking for a friend of my parents' car and I came across the police car in the aisle.

Q I can't hear you, Al.

A I came across the police car in the aisle with the door open, the driver's door. And I approached the car, about fifteen feet. And then I stopped and I noticed a policeman and another guy fighting on the ground. And I remember seeing the policeman with a billyjack in his hand.

Q Did you see him do something with that?

A No. I just saw the kid take it away from the cop and throw it.

Q And throw it?

A Yes, in between two parked cars.

Q Pardon?

A In between parked cars on the aisle.

Q He threw the jack in between parked cars?

A Yes.

Q Then what?

A They were wrestling on the ground for maybe a minute and the cop was on the bottom and the cop got up and he brought the kid over to the car, the police car. And I saw a girl sitting in the car and he asked the girl to give him the mike so he could radio for help.

And while this happened he had the kid against the car with one hand and when he went to reach in to get the mike, the girl broke loose -- the kid broke loose and he got in the police car. And the car was running and he put the gas pedal down to the floor.

And then the cop was yelling to him, get out of the car, get out of the car. And he reached in and he pulled him out of the car.

Q Who reached in?

A The officer.

Q Was the officer outside of the car?

A Yes.

Q And you say he pulled --

A Yes, he pulled him out of the car.

Q He pulled the young man who was behind the wheel?

A Yes, out of the car.

Q All right.

A And he had him on the side of the car and they were fighting for a while and the kid took a swing and hit the cop in the mouth. And then I saw a gun in his hand, the cop's.

Q Whose hand?

A The cop's.

And I saw him hit the kid a couple of times on top of the head.

Q With what?

A With the gun, the butt, the grip part you hold on to there.

And the kid was screaming for his mother, holding his head.

Q What do you mean holding his head? Who was holding him?

A Maybe he was in pain from being hit on the head, but he was holding his head, screaming.

Q Who was holding his head, the kid?

A Yes.

Q With his own hands?

A Yes.

And I heard a shot go off and broke the rear window of the door.

Q When you heard a shot go off, did you see a gun?

A Yes. He was hitting him over the head with it.

Q Who is the "he" that was hitting whom over the head?

A I'm sorry, the cop was hitting the kid over the head with the gun.

Q When the gun went off?

A Yes.

Q And then what?

A It broke the back window of the door in the police car. And then they --

Q Did you see the boy have his hands on the gun at any time?

A No, no, he didn't.

Q And --

A Then he broke loose and went to the rear of the car.

Q Who broke loose?

A The kid. And they went to the rear of the car and were fighting there for a while. And it was kind of grabbing each other, trying to get a hold of one another.

And I saw the cop take a step back and fire the gun. And I saw the kid go down.

And then I pulled my car along the police car and I asked the officer if he was all right. And he just looked at me dazed and he didn't say anything.

And I saw, I think the Coliseum guards or the cops over there. He came over and he told me to move on, so I went up about fifteen or twenty cars and parked my car and I just waited there a while.

And that night when I went home I went to a call phone and I saw a cop sitting in his car and I told him what I saw. And he told me there would be detectives over the next day to question me.

Q And were you questioned the next day?

A Yes.

Q And were you also questioned thereafter by somebody else, District Attorney or somebody like that?

A Yes. They took a statement.

Q And are you telling us now your best recollection of the events that happened that night?

A Yes.

Q And have you been shown various papers, the statement that you gave as well as the testimony that you gave to the DA --

A Yes, I have.

Q -- on October 1 of '72?

A Yes. I don't remember the date, but it was after.

Q In any event, it was -- this file, it was this file that you were shown or these papers that you were shown. Is that correct?

A Yes, it was.

MR. WEITZ: If your Honor please, may I indicate for the record that this is marked Plaintiff's 26 for identification. It's one of the records subpoenaed from the Nassau County Police Department.

I don't have anything else.

THE COURT: Do you want to take a five minute recess at this juncture?

MR. GARDNER: I don't need it, your Honor, unless the jury needs it.

THE COURT: Well, we have been going a little less than an hour, so I think they can go a little longer.

CROSS-EXAMINATION

BY MR. GARDNER:

Q Now, Mr. Loeffler, you had come to court, you said, sometime earlier and then you were sent home, right?

A What was that?

Q You had been subpoenaed to court before today, is that right, by Mr. Weitz' office?

A Yes, last Thursday.

Q And were you in court, in this building last Thursday?

A Yes.

Q Did you have occasion to meet Mr. Weitz?

A I believe so, yeah.

Q What about someone from Mr. Weitz' office, anyone else?

A Yes, there was one other person, but I don't know his name. I forget his name.

Q What time did you arrive in court Thursday, last Thursday?

A It was about ten o'clock.

Q What time were you sent away?

A A quarter of five.

Q And during that period of time between ten o'clock in the morning and quarter of five in the afternoon, anybody from Mr. Weitz' office or yourself talk to you about the case?

A Yes.

Q Were you shown that first day, last Thursday, when you were spoken to by Mr. Weitz or someone from his

office, were you shown the document, the signed statement you had made on October 1st, '72?

A Yes, sir, I was.

Q And was there any discussion between yourself and the person from Mr. Weitz' office or Mr. Weitz that -- as to any difference of what you said in the signed statement on October 1st, '72, and what you testified to today?

A Some of it I went over didn't seem familiar. I didn't remember everything.

THE COURT: Wait a minute.

Some of it --

MR. WEITZ: I think one of the jurors indicated a problem.

THE COURT: Read back the last answer.

MR. GARDNER: Can we have it read back for him, please?

A Some --

THE COURT: Wait a minute.

Read it back.

(The Court Reporter reads back the requested portion.)

Q So at least as of Thursday last week you went over what you had said on October 1st, '72, and it didn't

seem familiar to you, right?

A Yes.

Q Sir?

A Yes.

Q The reason I ask you, he can't get it when you shake.

And I take it because that's been almost four years?

A Yes.

Q A lot of things happened in your young life in the last four years, right?

A Yes.

Q Tough to remember, isn't it?

A Sure is.

Q Did either Mr. Weitz or anyone from his office attempt to help you remember the things you found difficult to remember in the four years?

A No.

Q Suggest anything to you?

A No.

Q Talk to you about where the gun was or who had the gun, anything like that?

A No.

Q Not a word?

A Just what I read over what I wasn't clear on.

Q What you weren't clear on? Who did you discuss what you weren't clear on with?

A I don't know; one of his associates, I guess.

Q Did he give you his name?

A No, I don't remember his name.

Q And when you -- what weren't you clear on that you discussed with Mr. Weitz' associate?

A I believe in the statement there they were saying the cop and kid were fighting over the gun. And I don't remember seeing anything like that.

Q You didn't remember that Thursday?

A Yeah.

Q And when you told them on Thursday, Mr. Weitz' associate, that you didn't remember four years after, that part of it about fighting over the gun, was there any discussion with Mr. Weitz' associate concerning that?

A No, there wasn't.

Q Did he --

A You see, in the statement --

Q Please --

MR. WEITZ: If your Honor please, can we have the witness answer?

THE COURT: He answered it.

Don't make a statement. Just answer the question.

Q Would you say your memory of what had occurred was fresher the day after the incident than it was last Thursday, four years after?

A Not really. I still remember just -- what I saw. Some of the statement didn't seem correct.

Q Did Mr. Weitz' associate suggest to you the manner in which it might not be correct, the statement you made in October?

A No. Anything that I didn't feel was correct was on my own.

Q I see.

By the way, was there any discussion about losing time from your work or any money you might lose by being away from your work?

A Yes, there was.

Q What was the discussion?

A That I would be paid for the days being out.

Q Mr. Weitz said you would be paid for the days that you were out, that was Thursday you were out?

A Well, Thursday I was on vacation, so it didn't matter.

Q And you would be paid for today, your being out?

A Yes.

Q How much would you be paid?

A $50 a day.

Q By the way, you had received a subpoena issued out of this court to appear, right?

MR. WEITZ: Judge, I will object to that. I don't even know what that means.

Q Before Thursday, before you arrived here Thursday, did you get a subpoena requiring you to be here?

A I believe so, yeah.

Q Did you get another subpoena to be here today?

A No.

MR. GARDNER: Can I mark this, if your Honor please? I prefer to have it marked as one exhibit, A,B,C and D.

THE COURT: I think you are beyond that.

THE CLERK: This is F.

MR. GARDNER: I mean F-1, 2, 3 and 4.

THE CLERK: Five documents marked for identification as Defendant's Exhibit F-1 and 2 and 3 and 4 and F-5.

Q Now, Mr. Loeffler, I am going to show you Defendant's Exhibit F -- I'm sorry, where is F-1? I have F-1, F-5, 3 and 2. Did you mismark them?

THE CLERK: You gave me four statements. It should be -- here it is, excuse me.

MR. GARDNER: Thank you.

Q Now, Mr. Loeffler, I will show you Defendant's Exhibit Number F-1 and ask you if that's your signature at the bottom.

(Handed to the witness.)

A Yes, it is.

Q Was that the first page of the statement you made on October the 2nd, 1972?

A Yes, it was.

Q Did you read it before you signed the first page?

A Yes, I did.

Q Did you make any changes on the first page?

A No, I didn't.

Q Did you indicate to anybody on the date that you signed that statement after having read it that it was incorrect in any manner, shape or form and needed correction before you signed it?

A No, I didn't.

Q I show you Exhibit Number F-2 and ask you if that bears your signature on the bottom.

(Handed to the witness.)

A Yes, it does.

Q Did you read that page before you signed it?

A Yes, I did.

Q Did you indicate -- did you sign that and read it on the first of October, 1972?

A Yes, I did.

Q Did you make any corrections on the page?

A No, I didn't.

Q Did you indicate to anybody that there was any error in anything at all that required correction before you signed it after having read it?

A No, I didn't.

Q I show you page number F-3, Mr. Loeffler, and I ask you whether or not that's the third page of the statement that you read and signed on the 1st of October, '72.

(Handed to the witness.)

A Yes, it is.

Q Did you make any correction on it before you signed it?

A Yes, one.

Q What was the correction you made?

A Here they have that the cop was beating him a couple of minutes on the head.

Q And you changed that to what?

A Right.

Q What, to what?

A A few times.

Q You changed a couple of minutes to a few times, right?

A Yes.

Q So the statement was originally written that the cop was hitting him for a couple of minutes and you crossed it over and changed it to a few times. Is that correct?

MR. WEITZ: This statement speaks for itself.

THE COURT: No, no, it's important. You're overruled.

MR. WEITZ: Your Honor, both counsel and the witness are both reading the change and it is not quite right, Judge.

THE COURT: Overruled, unless it's a misstatement of fact.

MR. WEITZ: Counsel and the witness are both reading a piece of the page and both of them are

misreading the statement.

THE COURT: You will have to correct it on redirect.

Q Mr. Loeffler, very simply, on the third page the statement you originally meant was a couple of minutes and it was crossed out and instead of a couple of minutes the statement about a minute, and it was crossed out and did you then put your initials, AL, on it?

A Yes, I did.

Q Did you make a correction on it?

A Yes.

Q And you didn't make a correction on 1 and 2?

A No.

Q And you signed it?

A Yes, I did.

Q Read it?

A Yes, I did.

Q Make any other corrections except the other corrections you made and initialed?

A No, I didn't.

Q Tell anybody there were any corrections you wanted to make besides that one correction on page 3?

A No, I didn't.

Q I show you number four and I show you number

five, F-4 and F-5.

Did you read those two pages the same as you read the other two pages when you signed it?

(Handed to the witness.)

A Yes, I did.

Q Did you make any corrections on those pages of your statement of your recollection of the incident on October 1st, '72, before you signed it?

A No, I didn't.

Q Did you tell anybody there had to be any corrections that you wanted to make a correction on pages number four and pages number five as you had made on page number three when you signed it?

A No, I didn't.

Q Was the statement you gave on October 1st, '72, contained in those five pages which you read and which you signed the truth as you best remembered it on the 1st of October, 1972, one day after the incident?

A Yes, it was.

Q Memory better one day after the incident than it is today, four years after?

A I think it's just about the same, really.

Q By the way, when you left the courthouse, Mr. Loeffler, on Thursday, did anybody give you the

statements so that you could read it and maybe refresh your recollection? Were you given a copy to take home?

A No, no.

MR. GARDNER: I offer it, if your Honor please.

MR. WEITZ: If your Honor please, I have absolutely no objection, except I think we might have the original because it would be easier for the jury to read the original. The original is in court. I subpoenaed it.

THE COURT: It's up to counsel.

MR. WEITZ: Do you have any objection to letting them have the original?

MR. GARDNER: We will have to remark it.

THE COURT: That can be done. You don't have to hold the jury up for that.

THE CLERK: Remark them as an exhibit?

MR. GARDNER: Can we redact it as the same?

THE COURT: Why don't you just read it, if it's the exact thing. Your copy will be admitted into evidence now and give him your copy and you can substitute it later on. You don't have to hold the jury up while he goes through marking it.

MR. GARDNER: Homicide, 1752-72, statement of Alan Loeffler, October 1, '72.

"My name is Alan Loeffler. I am seventeen years old, born November 23, 1954. I live at 88 -- "

Q It looks like Gonto (phonetic spelling) Avenue.

A Toronto.

MR. GARDNER: "Massapequa, New York, with my parents. I am employed part-time at Red Lisa Esso Station, Hicksville Road, Massapequa, New York.

"On Friday, September 29, 1972, I went to the rock concert at the Nassau Coliseum with Glen Logan. We got there shortly after eleven o'clock p.m. I was driving my father's car, a 1971 Impala, plate number MW2212, New York, in the south parking field looking for Glen's mother's car as it had been in an accident. I was driving up and down the aisles looking for it. While I was looking for the car, I noticed a guy running, being chased by a girl. The girl called, 'Johnny, Johnny.' I think this guy was chasing two other girls, but I am not positive. I passed by the guy and I looked at him and I knew he was on something, drugs. He wasn't drunk.

"I continued looking for Glen's mother's car. A few minutes later I drove down an aisle going

toward the Coliseum and noticed a white police car with the driver's door open. I drove up to fifteen or twenty feet in front of the police car and stopped. I noticed a girl with long dirty-blond or light brown hair in the police car. Outside the police car I noticed a policeman and a guy wrestling on the ground. The cop was on the bottom, the guy was on his back. I don't know how the cop got up, but he did, and he brought the guy towards the driver's door of the police car.

"I then saw the girl in the police car give the cop the mike. When the cop was holding the mike the guy jumped into the police car. The guy must have put the gas pedal to the floor as I heard a loud engine scream. I heard the cop scream at the guy to get out of the car. The cop and the guy were struggling. All of a sudden the cop had the gun, I think it was the cop's gun, by the barrel. I don't know whether the cop or the kid pulled the gun out. The cop hit the guy in the head a few times with the back of the gun."

Then there is the cross out, a couple of minutes, struck out with your initials, AL.

"About a minute later the cop got the guy out

of the car. The kid was screaming, 'Mom, mom'. The cop had him by the wrist. Then the guy started to hit the cop in the mouth. The cop grabbed the guy's hair and pushed him towards the police car. I think the cop hit him in the head with the gun. As the cop was hitting the guy with the gun, the gun went off and I heard glass break. They continued to fight and were now at the back of the police car. It looked like the guy was trying to grab the cop's gun. They were still fighting.

"Then I heard the gun go off again and the kid fell to the ground. The cop walked to the side of the police car and leaned against it. He was bleeding hard. He looked like he was dazed.

"While this was going on I didn't see anyone around, no other policemen. While the cop was leaning against the car after the second shot, a plain clothes policeman arrived. I pulled up next to the police car with my car. I asked the cop if he was all right. He didn't answer. He looked dazed.

"Then the plain clothes policeman told me to leave. As I was leaving a large number of police cars arrived. I pulled over and let them get in.

I then parked my car and stayed for about five or ten minutes. Then Glen and I went and got something to eat and then we went home.

"Last night about one a.m. after work I went over to a police phone and told the policeman there what I had seen at the Coliseum the other night. The policeman took my name and address, called somebody on the phone. The officer told me to go home, that somebody would see me.

"I have given this statement to the detective, read it, signed it and it is the truth to the best of my knowledge."

BY MR. GARDNER:

Q Now I ask you, Mr. Loeffler, was it not in fact that this document marked Defendant's F, each page which you read and signed as of October 1st, 1972, was the statement that you read, that you signed and which was the truth, to the best of your knowledge at that time?

A It was.

Q You didn't say in this statement anywhere that the policeman stepped back and shot --

MR. WEITZ: The statement speaks for itself, your Honor.

THE COURT: Overruled.

Q Did you?

A No, not in there, no.

Q By the way, the policeman was pretty tall, wasn't he?

A Yes, he was.

Q When he stepped back, as you told us before, where was the boy in reference -- where was the other fellow? Where was he in reference to the policeman in terms of height? Was he eyeball to eyeball with him?

A No.

Q Much lower?

A About to his shoulder, I guess.

Q And when the policeman aimed the gun, as you indicated before, did he aim up, straight forward or down?

A I am not really sure.

Q Are you not really sure because you didn't see it?

A Well, we were in back of their car and I was in front of the police car.

Q And was there something between you and the policeman and the boy at the time that second shot went off?

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A The police car, yes.

Q How high was the police car?

A Three feet, the back of the car maybe? All I could see was from their waist up.

Q And you saw them from their waist up. Did you see the policeman's hands?

A Yes, I believe I saw them.

Q When you say you believe you saw them, is that what you told to Mr. Weitz' assistant the other day, that you believe you saw him?

MR. WEITZ: Just one minute, your Honor.

MR. GARDNER: Please, Mr. Weitz.

MR. WEITZ: I object to what he told me.

THE COURT: Mr. Weitz' associate, he said.

MR. WEITZ: He said or his associate.

THE COURT: Is that what you told Mr. Weitz' associate? Is that what I heard?

THE WITNESS: Yes.

Q Wasn't there any discussion at all between you and Mr. Weitz' associate as to what your testimony would be before they put you on the stand?

A No. They just went over it with me, that's all.

Q When you say you went over it, how did this associate of Mr. Weitz go over it with you?

A Just asked me questions, what you're asking me now.

Q By the way, you didn't recall seeing Mr. Weitz' associate on the 29th of September, 1972, in the Coliseum?

A No.

Q He wasn't there?

A No.

Q Did Mr. Weitz' associate spend some time with you, Mr. Loeffler, in trying to get you to remember these things that you're having difficulty remembering?

A Some, yeah.

Q By the way, as you viewed the other person with whom the police officer was having this struggle, did you have an opinion as to whether or not that other person was on drugs?

A It seemed that he was, yeah.

Q Had you seen other people of similar age undergoing the effects of drugs?

A Yeah.

Q And what kind of effects was this other fellow having that drew you to the conclusion that he was on some kind of drug?

A He just had the look in his face that he was. He looked dazed and he wasn't clear.

Q Did you have any discussions with anyone else recently besides Mr. Weitz' associate to help you refresh your recollection?

A No.

MR. GARDNER: One moment.

(Whereupon, there was a pause in the proceedings.)

Q Now, you remember where it was that this statement was taken from you which you read and signed on each page?

A Yes, it was in Mineola.

Q Where?

A At Homicide, I believe, in Mineola.

Q Did there come a time in addition to that statement which is marked Defendant's Exhibit F, that you also were asked -- that you also gave some answers to a District Attorney who asked you some questions?

A Yes, there was.

Q That was different than the statement you read and signed, and by that I mean that was a different place than the statement that's marked F?

A What do you mean a different place?

Q Was this statement taken at one time and thereafter the District Attorney asked you questions in ad-

dition to this statement?

A I believe so, yes.

Q And you gave statements at two different times, one which is marked F, the written one and the second one in response to certain questions by the District Attorney. Is that correct?

A I believe so, yes.

Q Were you asked this question and -- let me put it this way: Did you ever tell the District Attorney that you were not able to see these parties, namely, the policeman and this other fellow, at the time the gun went off because you were in front of the police car and they were in back?

A Yes.

Q And did you tell the District Attorney that because of the position, namely, that they were in front -- you were in front of the police car and they were in back, that you were not able to see either of them, the boy or the policeman when the gun went off?

A I could see the two of them standing there, yeah.

Q But you didn't see the gun go off, did you?

A No.

MR. GARDNER: Nothing further.

MR. WEITZ: May I have that document in evi-

dence?

(Document referred to handed to Mr. Weitz.)

REDIRECT EXAMINATION

BY MR. WEITZ:

Q Alan, you have already told us this is a true statement when you gave it.

A Yes, it was.

Q I just want to ask one or two questions about this document.

This document, is it in your handwriting?

A No, it isn't.

Q Is it in the handwriting of the police officer who took it from you?

A I believe it is, yes.

Q And would you tell this jury how was this done? I mean, did you answer questions and he wrote as you answered questions or what? How was it done?

A I really don't remember. I believe so, but I'm not too sure.

Q Did you stop him during the writing or did he write it out and say to you, I want you to initial this thing on page three, and then you printed your initials?

A No, I read it over and I noticed it and I told

him.

Q Would you take a look and see the way this is written. I want to show you something.

(Exhibit handed to the witness.)

A I saw it before.

Q It says the cop hit the guy in the head a few times with the back of the gun, period. And the next sentence says a couple of minutes, and a line was drawn through it.

Do you see it?

A Yes.

Q Did you start to say a couple of minutes and then say to the officer, wait a minute, strike it out? Or did he write a couple of minutes and then change it and say about a minute later and say to you, now, son, would you initial this paper for me?

MR. GARDNER: Your Honor, if Mr. Weitz wants to testify he should withdraw the witness and take the stand.

THE COURT: Strike it out, all out, unless you wish to take the witness stand. It's not admissible on redirect.

MR. WEITZ: It's their document. I have no objection to it. I just want to find the circum-

stances under which it was prepared.

THE COURT: That's not the way to ask.

Q Alan, you did tell the cops on September 29th, 1972, you went to the rock concert at Nassau Coliseum with Glen Logan and you got there shortly after eleven p.m. Is that right?

A Yes, I did.

Q You did tell the police while you were looking for the car you noticed a guy running, being chased by a girl and the girl was calling, "Johnny, Johnny", right?

A Yes, I did.

Q You think that the guy -- you thought the guy was chasing two other girls, but you're not sure, you told them that?

A Yes.

Q And he wrote it down?

A Yes.

Q And that was true as far as you knew?

A Yes.

Q And you passed by the guy and you looked at him and you knew he was on something, drugs, but he wasn't drunk?

A Yes.

Q And you say he was on drugs.

What was it you told Mr. Gardner before that caused you to come to that conclusion that this fellow was on drugs? What was his state?

A He just looked like he was. You could look in his face, his eyes were glassy, I believe.

Q You used the word "dazed". Is there another word kids sometimes use, spaced out, is that what you mean?

A Yes, kind of.

Q Like disoriented?

A Yes.

Q Now, you told the police officer you continued driving looking for Glen's mother's car and a few moments later you drove down an aisle going towards the Coliseum and I noticed a white police car with the driver's door open? You told them that, didn't you?

A Yes.

Q And that was true?

A Yes.

Q And then you said, "I drove up to fifteen or twenty feet in front of the police car and stopped." And that was true, wasn't it?

A Yes.

Q "I noticed a girl with long dirty-brown hair or light brown hair in the police car. Outside the police car I noticed a policeman and a guy wrestling on the ground. The cop was on the bottom, the guy was on his back."

A Yes.

Q Is that what you saw?

A Yes.

Q You told it to them then and you're telling it to this jury today, that that is true?

A Yes.

Q "I don't know how the cop got up, but he did and he brought the guy towards the driver's door of the police car." You saw that happen, too?

A Yes.

Q "I then saw the girl in the police car give the cop the mike. When the cop was holding the mike the guy jumped into the police car." That was true, too?

A Yes.

Q And then you heard a loud engine scream, right?

A Yes.

Q And you adduced from that, as you said, the police officer and the guy must have put the gas pedal

to the floor because of that sound you heard?

A Yes.

Q And you did hear it, there is no question about that, is there?

A No.

Q That's true and it was true on October 1st when you gave this statement and it was true earlier today when you told it to Mr. Gardner?

A Yes.

Q And then you said, "The cop tried to pull him out of the car. The cop and the guy were struggling. All of a sudden the cop had the gun."

Did you see that?

A Yes.

Q They were struggling?

A Yes, he was trying to pull him out of the car.

Q And then was it true when you told them that you saw the cop with the gun? Was that true when you said it on October 1st, 1972?

A Yes.

Q And it is true today?

A Yes.

Q You didn't know whose gun it was at that time, correct? You just knew there was a gun?

A Yes.

Q And you said, "I think it was the cop's gun," but as you say, you don't even know today whose gun it was. Isn't that true?

A Yes, right.

Q And you say the cop hit the guy?

MR. GARDNER: I will object, if your Honor please. Counsel is reading half or part of a sentence.

MR. WEITZ: I will read the whole sentence.

THE COURT: You can go back and reread the entire statement, Mr. Gardner, to the jury again if he leaves anything out. If he leaves any portion of anything out, you can start from the beginning and reread the entire thing.

Q Alan, I will read you the entire sentence.

"The cop and the guy were struggling. All of a sudden the cop had the gun, I think it was the cop's gun, by the barrel."

A Right.

Q Is that true?

A Yes.

Q "I don't know whether the cop or the kid pulled the gun out."

You didn't see the gun come out?

A No. I just saw it in the cop's hand.

Q You just saw cop's hand on the gun?

A Yes.

Q And that was at the side of the car?

A Yeah.

Q "The cop hit the guy on the head a few times with the back of the gun."

Did you see that?

A Yes.

Q No question in your mind about that?

A No.

Q That was true then when you told it to the police officer on October 1st of '72 and it's true now as you tell it to this jury?

A Yes.

Q "About a minute later the cop got the guy out of the car."

True?

A He wasn't -- I didn't see him hitting the kid on the head inside the car. He was pulling him out of the car and when he --

THE COURT: How could all the be true if about a minute later they got out of the car?

THE WITNESS: I don't understand how it was written and I signed it, you know.

THE COURT: It wasn't true?

THE WITNESS: No. I don't remember right now seeing the cop --

THE COURT: That page wasn't true then?

THE WITNESS: That part isn't correct, no; unless my memory isn't the same.

THE COURT: Your memory is better today than --

MR. WEITZ: Judge, please.

THE COURT: Wait a minute.

MR. WEITZ: You interrupted him saying my memory is better today.

THE COURT: Your memory is better about four years -- is better today than four years ago?

THE WITNESS: I don't know if it's better, but it's not the same now.

THE COURT: You rethought it another way?

THE WITNESS: It's just that I remember it different now. I don't remember the cop hitting him in the head when he was inside the car. I remember the cop yelling at him and trying to pull him out of the car.

THE COURT: But you said they struggled as

they were still in the car.

THE WITNESS: Yeah, pulling each other out of the car.

THE COURT: Yes.

Q Let me ask you this, Al: As far as this statement was concerned --

THE COURT: Wait a minute.

Do you have any real independent memory of anything except what is in that statement?

THE WITNESS: Yes.

THE COURT: You do?

THE WITNESS: Yes.

THE COURT: And what is in there is wrong, is that what you're saying?

THE WITNESS: It seems like that line is, yes.

THE COURT: I see.

Q Alan, let me put it to you this way. When this statement was made at that time, you told the cops the events that you recalled?

A Yes.

Q All right.

As of this moment there is a difference between your recollection now and what you said here. Is that correct?

A Yes, there is.

Q Fine.

But as far as everything I have read, everything up to here, your recollection has been the same?

A Yes.

Q All right.

Are you saying this is incorrect or that there is a difference in your memory between this and what is written here?

A I'm not sure, you know. I don't know if that's correct.

Q Or your memory is correct?

A Yes.

Q All right.

You wouldn't deny, Alan, that this is what you said at that time? Do you deny you said this?

A No.

Q You don't deny it, do you, or just that you don't know?

A I don't know -- I don't deny it.

Q And you did sign this page in which you said the cop hit the guy in the head a few times with the back of the gun? You did sign that page. Is that right?

A I believe so.

Q Let me show it to you. It's right here.

(Handed to the witness.)

A Yes, I signed it.

Q And you did put that initial right after that on that -- on that couple of minutes?

A Yes.

Q And you did, at least on this page, say about a minute later the cop got the guy out of the car?

A Yes. He wasn't in the car that long, really.

Q All right.

So as to whether your memory is correct as to where those blows to the head were delivered, your memory today and what you told them in 1972 and what they recorded in 1972, you did tell them that the young man was struck on the head by the cop while the cop was holding the gun?

A Yes, I did.

Q And you told them that?

A Yes.

Q And is that true?

A Yes.

Q Do you have a clear picture of that taking place, whether it was inside the car or outside the car?

A Yes.

Q And your statement continues, "The kid was screaming, 'Mom, mom.' The cop had him by the wrist."

Was that true?

A Yes.

Q Can you recall now, Alan, which wrist the cop had him by?

A No, no. I'm not sure.

Q Can you recall which hand the cop was using when he had him by the wrist? Don't guess. If you can't, please don't guess.

A I'm not sure now, no.

Q But you do recall, you have a picture in your mind about the cop having him by the wrist?

A I believe so, yes.

Q And when you told that to the police back in 1972, that was true as far as you can recollect, a couple of days after the event?

A Yes.

Q And, Alan, without my going through the whole thing, you heard Mr. Gardner read the statement to the jury, did you not?

A Yes.

Q And would you agree, except for one thing you said where your memory was different, would you agree

that this is a true and correct statement of what you remembered within a couple of days after this accident -- this event?

A Yes.

Q You don't know me?

A No.

Q In fact, when you came in here to court the other day, Thursday, you walked in with a subpoena and you walked over to Mr. Gardner and you asked him what to do. Do you recall that?

A Yes.

Q I didn't even speak to you at that time, did I?

A No.

Q And all these times you have been here in court, you have been in what is known as the witness room on the other side of this corridor, right?

A Yes.

Q In the courthouse the only paper -- and you were asked questions as to what you knew?

A Yes.

Q And you were told to tell the truth here, weren't you?

A Yes.

MR. GARDNER: This is nice testimony of Mr. Weitz who never even spoke to the witness.

THE COURT: That was all testimony you just gave, Mr. Weitz, whether you knew it or not.

MR. WEITZ: You know, Judge -- may I make a motion at side bar? I really think that was uncalled for.

THE COURT: No. I will deal with your motion -- I will deny your motion.

MR. WEITZ: I think it was uncalled for.

THE COURT: It wasn't uncalled for in the light of what you just did.

MR. WEITZ: Is your Honor saying I did something improper?

THE COURT: Yes.

Sit down.

RECROSS EXAMINATION

BY MR. GARDNER:

Q The day that you signed that statement marked Defendant's F, until the moment that you came into this courtroom on Thursday, up to the moment before you spoke to Mr. Weitz' assistant, had you ever read that statement?

A No.

Q Did you ever have anybody question your memory or recollection up to the time that Mr. Weitz' associate spoke to you?

A No.

Q Up to that time the only thing you knew of that event is what you had recorded on the statement of October the 1st, '72, right?

A Yes.

Q And it was as a result of the discussion with Mr. Weitz' associate for the first time that some doubt was put in your mind as to whether what was put in that statement was accurate or not? Isn't that true?

A Yes.

Q Because you had no reason to question what you had said before until Mr. Weitz' associate spoke to you. Isn't that right?

A Yeah.

MR. GARDNER: Nothing further.

(Witness is excused.)

THE COURT: We will take a five minute recess.

Don't discuss the case.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: You should understand, Mr. Weitz, that when you call a witness, that you do not cross-examine him nor do you lead him on direct examination as you have done. You did it in the case of Sgt. Sehlmeyer and the Court, of course, let you do it because he was a hostile witness. But you don't do it with your own witness. That was the objection that was made. The objection was a perfectly proper one. You carried on practically a single handed dialogue; no one asked you this, you were told to tell the truth, all of this sort of thing. It was nothing but testimony by you.

MR. WEITZ: I would ask the Court to reflect for a moment on the witness' testimony prior to this statement, just reflect for a moment what he said. Reflect for a moment that the testimony was read and the statement is in fact the plaintiff's

position in the case, this boy didn't lie about anything. He was accused of lying. He tried at one point to give an honest answer that he doesn't know whether his memory is better today or the statement is correct. And all I did was ask him about those questions, the remarks on the statement.

And when Mr. Gardner, who I am sure the Court understands is an exceptionally capable and experienced lawyer, I have known Mr. Gardner over many years in this field. He sat for whatever reason he felt, he made no objection until the very end of my questioning and then he didn't make an objection, he made a statement, your Honor, that I was testifying.

That's fine. That's counsel's tactics and that's the way he wants to try the case, great. If he wants to make that statement for the record, fine.

But for your Honor to say something beyond objection sustained, which the Court did not do, and I don't think the Court realizes what the Court did. The Court said, "Yes, Mr. Weitz, you have been testifying all along," or words to that effect.

Now, your Honor, I feel I am trying an extremely difficult case under extremely difficult conditions. I feel that it was uncalled for to characterize my cross-examination. A ruling--

THE COURT: You don't have cross-examination of your own witness.

MR. WEITZ: My redirect. I'm sorry, Judge, my redirect.

THE COURT: This is what I said at the outset and you cannot seem to get it through your head. When you call a witness you do not cross-examine the witness.

MR. WEITZ: My redirect, your Honor. I apologize for my mistake.

THE COURT: That was the point of my comment to the jury because it is improper for you to conduct an examination of your own witness in the manner in which you did.

MR. WEITZ: Judge, one of two things should have happened. Either Mr. Gardner should have objected before hand, which he did not; or if the Judge presiding earlier thought that I was doing something improper, the Judge should have said, "Now, Mr. Weitz, it's your witness."

But to allow an examination to be completed and then to say to this jury at the end of the examination, "Now, everything," in effect, your Honor, "everything this lawyer did was improper," I don't think it's called for under the circumstances.

THE COURT: That is not what I said.

MR. WEITZ: That is what you did say.

THE COURT: Mr. Gardner said, "May I have an objection that those last questions were nothing but Mr. Weitz testifying?"

And I had no alternative but to agree because it was testimony by you.

And then when you took exception to that I made the comment I did, which I think was perfectly proper.

You said, "What have I done wrong?"

And I said, "I think you have done something wrong." And I think you must realize that you cannot on the plaintiff's case call a witness who is not an adverse witness--you call this one as a favorable witness--and carry on a cross-examination in the manner you did.

MR. WEITZ: Judge, you just quoted Mr. Gardner as having arisen after I have completed my examination and making a gratuitous remark which the Court then concurred in it. And that is precisely the kind of thing I have taken exception to.

THE COURT: It's not improper when it's a proper objection.

MR. WEITZ: But I completed my examination, Judge.

THE COURT: You did it before we had an opportunity to even record this objection. You ran the last three questions in top rate speed.

If you're going to pull that kind of tactic you're going to get that kind of comment.

MR. WEITZ: I think the remarks of the Court at this time are not an accurate reflection. Probably the Court's memory is not--I don't think the Court is deliberately misstating what took place or the pace of which I conducted the questioning, but I think the Court--and I merely state this for the record--I think your Honor's last remarks are not an accurate reflection of what took place. And I don't want the record to think I

am not conceding--

MR. GARDNER: Your Honor, what has occurred here is what has been happening throughout the trial and what happened through the last series of rapid fire questions to which I made the objection that Mr. Weitz was leading the witness, and I rose to object to the question and there is a talk over or a scream over or three or four more questions. I will not outshout him. Your Honor made comment about it quite properly before and your Honor, I think, indicated we did not have courtesy towards each other.

I have tried to conduct myself differently since that time, but I am just held over everytime I start to make an objection by a louder voice where even the stenographer cannot get the objection.

THE COURT: The Court is fully aware of what has been going on. It has tried to equalize things as best as it could, given the facts and the way this trial is conducted. It will continue to do so. It will not be intimidated by Mr. Weitz' retorts. And Mr. Weitz had better watch his conduct in this courtroom, as I have admonished

him before. 56o

MR. WEITZ: I am not attempting to intimidate the Court. I know the Court cannot be intimidated. And I also know nobody has ever rolled over John Gardner in a trial. And that's totally self-serving.

And I understand the complete contents of Mr. Gardner's remarks and descriptions a few moments ago for the record. They are not factually accurate, Judge.

THE COURT: That's only in your self-serving opinion.

MR. WEITZ: Judge, would you at least concede to me that what Mr. Gardner said is also self-serving?

THE COURT: No, I will not. Because his recollection, as I indicated prior to his comments, is more in tune to mine than yours is on that issue, that issue alone.

We will take a five minute recess.

(A recess is taken.)

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

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THE COURT: Go ahead, Mr. Weitz.

MR. WEITZ: The plaintiff rests, your Honor.

THE COURT: Well, I'm sorry, ladies and gentlemen. I understood the plaintiff to have another witness. I will have to reexcuse you for five minutes.

Don't discuss the case.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: You know, you talk about having courtesy and consideration for other people, but when you're out of witnesses and you know I will have to bring the jury in and out again, why did you do that?

MR. WEITZ: I am not out of witnesses--I wasn't out of witnesses, your Honor. I have changed my mind how I will proceed. I told Mr. Gardner a few moments ago.

THE COURT: Why didn't you get word to me?

MR. WEITZ: I had no idea, Judge, where you were.

THE COURT: I am just flabbergasted. I don't know. There must be something wrong.

Anyway, do you wish to make some motions?

MR. GARDNER: If your Honor please, before I proceed with my motion I would like to give the Court an original and one copy of the defendant's memorandum of law and one to Mr. Weitz.

THE COURT: This is not the memo you previously handed up?

MS. BILLAVER: No.

MR. GARDNER: If your Honor please, on behalf of my client, the County of Nassau and Robert Sehlmeyer, the defendants in this case, I move to dismiss the complaint and all remaining causes of action therein for the plaintiff's failure to make a prima facie case on several grounds.

First, if your Honor please, it's the defendants' position that the entire complaint and all the causes of action must call for a failure to prove because the plaintiff has failed to prove a requisite because of the applicable sections of the Municipal Law, General Municipal Law 15E has not been complied with.

If your Honor please, I believe if you look at the first cause of action in Paragraph--

THE COURT: Well, the first cause of action,

Mr. Gardner, as we have interpreted it most favorably to the plaintiff in our previous opinion dated March 31, 1976, was against Sgt. Sehlmeyer, not in his official capacity, but in his individual capacity, acting allegedly with malice, and so forth, in an arbitrary manner.

If our interpretation is correct, then Section 15E of the General Municipal Law is inapplicable.

MR. GARDNER: Only to the first cause of action, your Honor.

THE COURT: That's right.

MR. GARDNER: But I am directing my comments, your Honor--maybe I wasn't clear--to the remaining causes of action in the complaint other than the first cause of action.

The plaintiff in essence seeks to allege a willful and wanton act resulting in personal injury and resulting in wrongful death.

Now, those other causes of action other than the first cause of action are basically an attempt to plead a negligence cause of action or a willful wanton act resulting in an injury and in death.

Now, in those two causes of action he is required--it's mandatory that he proves compliance with 15E. This is separate and distinct from the first cause of action where he alleges that there was a violation of his rights allegedly under the--

THE COURT: Let me stop you right there.

What is the name of your associate who has attended all the pretrial conferences, Mr. Weitz?

MR. WEITZ: Mr. Freedberg (phonetic spelling).

THE COURT: Mr. Freedberg, he represented to the Court last fall that he had complied with 15E.

MR. WEITZ: Yes. And there was no issue in the pretrial order of this, Judge.

THE COURT: Is that the fact, you have submitted proof here?

MR. WEITZ: I believe I have a copy of it. I will search my file for it. I did look for it.

THE COURT: I will better allow you to reopen for that purpose.

He did represent to the Court that I--he had represented that 15E had been complied with

and there was no dispute by the County at that time.

MR. GARDNER: I only draw my objection in view of the testimony that came out of the witness stand, your Honor. My motion to dismiss is only directed from what I see to be a failure of proof from the witness stand.

If your Honor tells me in the interests of justice you would permit him to reopen it that--

THE COURT: I would have to, assuming he had so complied. I would have to, because we had this debate at a pretrial discussion, because I believe I raised the statement at that time that the case goes out unless 15E had been complied with. And Mr. Freedberg assured me it was complied with and the county raised no objection.

MR. GARDNER: In view of your Honor's statement I will withdraw the motion on the basis of 15E and proceed to the merits of the motion on that ground.

On the first cause of action and in view of the law of the case as indicated and quite appropriately, if your Honor please, that there is no cause of action against the county of Nassau and the cases support the proposition that against any

individual such as Sgt. Sehlmeyer is concerned, the only matter by which, as flowing under the alleged causes of action, would be in his individual capacity and only for those acts which he may have performed which were either ultra vires and without the cause of his authority, namely, not within the scope of his employment, or as the cases say, not within the perameters of his duty.

And our memorandum of law supports the proposition, as we conceive the reading of the law, if your Honor please, that 1983 and the other Civil Rights Acts under which claims being made, clearly indicate, and the cases indicate that there was a revision prohibiting in essence a rating of the State's treasuries so that no action could lie against the State.

And I think similarly the tenor of the case and the language therein is equally applicable to the proposition of whether or not the municipality or state is a named party is immaterial if the attempt to gain recovery is through acts of one of his employees who was performing his duty within his capacity.

So that it is our position that the first cause of action must fall under the Civil Rights Act against Sgt. Sehlmeyer since the evidence is perfectly clear that everything he did on the evening of September 29th, 1971, against Kaber, was within the perameters of his duty and the scope of his employment and within the responsibility he had as a police officer.

And consequently, no cause of action can lie against him under that first cause of action unless he did something that was outside the scope of his employment, an essence of frolic of his own and not within the perameters of his duty and the evidence fails to show that.

THE COURT: Would you go this far: If the jury, given the facts that they have, could find either immediately prior to the second shot or at some prior time, for the sake of hypothesizing, and down to the second shot, Sgt. Sehlmeyer acted arbitrarily, with malice, and so forth, as alleged in the claim--in the complaint, the first claim, would that not be outside the scope of his authority? Would you not agree?

MR. GARDNER: No, your Honor, I would not.

Because it is the duty of a police officer to attempt--to make detentions, to make arrests, to prevent injury to persons in the vicinity, with which he is charged with patroling.

THE COURT: I will grant you all that, but, Mr. Weitz' theory, as I understand it--and he can correct me if I am wrong--it's Mr. Weitz' theory that he exceeded the stated guidelines or regulations of Nassau County when he, as Mr. Loeffler testified, and I don't know whether he completely withdrew it or not--he took one step back and shot the defendant--shot George Haber, rather, when the second shot went off.

And at that point, at least in Mr. Weitz' mind there was evidence of malice and arbitrary action which exceeded what was required to make an arrest in this case.

MR. GARDNER: I think your Honor has the obligation then under the evidence adduced at this point--

THE COURT: I have to take it favorably to him.

MR. GARDNER: But I say, as favorably as the Court can take it to the plaintiff in this

case, the Court in my judgment must come to a conclusion that as a matter of law no reasonable jury can come to that conclusion as the facts are presently before that jury.

In addition to which, it is the position of the defendant that even assuming that this was a willful and intentional act as alleged, which I do not believe the evidence supports and why I am arguing this cause of action should be dismissed, certainly good faith would be a defense as far as Sgt. Sehlmeyer is concerned in his individual capacity.

THE COURT: Certainly he was acting in good faith, but he wouldn't be acting with malice and arbitrarily then, and so forth.

You couldn't have sustained this burden of proof as to malice, reckless and willful abandonment, and so forth, if he was acting in good faith. But that's a question for the jury, isn't it, to determine whether all the facts adduced here, and as I see it there are two sets of facts Mr. Weitz pointed to, one is the testimony of the young girl in the white blouse who testified on the first day, whose name I can't recall--

MR. WEITZ: Nelson.

THE COURT: Miss Nelson--Mrs. Nelson?

MR. WEITZ: Mrs. Nelson.

THE COURT: Yes, who said that her recollection was when both shots went off Sgt. Sehlmeyer had George Haber by the hair and Haber's hands were flying around and the gun came up to fire the second shot, although she didn't see it go off.

Mr. Loeffler, nonetheless on direct testified that he saw Sgt. Sehlmeyer take a step backwards and shoot the gun.

And, of course, he said he didn't see that. And it's a question of fact in each instance. And whether there are facts, given all the facts theorhetically which they could disbelieve, all of the other facts, and assuming Sgt. Sehlmeyer was in complete control of this situation from square one, and this was as indicated malicious conduct, if I take everything favorable to Mr. Weitz, which I am obligated to do--I am arguing the case for him now.

MR. GARDNER: I understand, your Honor.

THE COURT: If he were arguing he would

say,"Judge Platt, you have to disregard what has gone before and take that much, and assume the rest is disbelieved."

Isn't that correct, Mr. Weitz, in essence?

MR. WEITZ: Your Honor, I would be somewhat stronger than that, but that will be the minimal argument I would possibly present.

THE COURT: What in addition would you say?

MR. WEITZ: I think the credible evidence clearly is weighted in favor of the plaintiff here. I don't think under any version of the testimony so far, other than--even including Mr. Sehlmeyer's testimony--

THE COURT: Sergeant.

MR. WEITZ: I don't know. He hasn't told us his status. He has been in Lake Luzerne (phonetic spelling) when I tried to serve him. And he has been in various places over the years. But he gives Lake Luzerne as his address.

But if he is a Sergeant with Nassau County Police, even his version shows he exceeded the rules and regulations of the department. And if that's the argument that--well, in order for me to have a prima facie case he has to go beyond the

rules and regulations of the Police Department and he has even admitted to that.

THE COURT: You think that in and of itself is sufficient without showing the fact where malice can be inferred?

MR. WEITZ: I think it is, Judge, yes. And whether that's a question of law or not, I don't know. I believe it is. I believe that's sufficient under 1983 to make out a case against this man. And I also think it's sufficient under Article 14 of the Constitution to make out a case. But that's another case--I mean the Fourteenth Amendment, I'm sorry, Judge.

But what your Honor said is the very least I would say and I would adopt your Honor's position as my minimal position for the purposes of this argument.

MR. GARDNER: As to the Fourteenth Amendment, your Honor, actually it's talking about the Fourth Amendment as applied to the State. I think it's agreed when the municipality takes over the State function, therefore, they gain the immunity of the Eleventh Amendment. So I don't see why the Fourteenth or Fourth Amendment comes into play at all.

This is obviously a municipality through the police officer performing a state function.

And the other argument, your Honor, it seems to me in your Honor's thought process your Honor's having some concern about whether or not within the scope of employment as a police officer means that once an officer does something in the furtherance of his duty, which police officers might do, which now assuming only for argument purposes, which may well go, let's say, beyond the limitations of a rule and regulation, but which police officers may well do, and that that constitutes a function outside the scope of his authority.

I am of the contrary opinion. It seems to me if a policeman is required to make arrests and subdue people, your Honor, and even if a police officer, assuming arguendo uses more force than the law might say in ultimate in view of what the analysis is, is the requisite or appropriate force, it doesn't make his activities outside the nature of his employment and the municipality can wash himself of the responsibility of this act. Because certainly the municipality can be

sued by an act performed by a police officer where he used excessive force in a civil law suit, let's say, in a state action. And the plaintiff will allege that he used force beyond that which was considered reasonable.

It's not a defense to a municipality to say in a state court action, we are not responsible any more because his actions exceeded the authority because we trained him and told him only to use the requisite amount of force. So, therefore, plaintiff in the state action, I'm sorry, he is outside the scope of his employment because he exceeded that term.

And also, your Honor, so, too, in the Civil Rights Act, we have to keep the same perameters of what constitutes the scope of his authority. And the Civil Rights Act suggests, as I see it and as the cases perceive it, is that a police officer during the course of his performing his function as a police officer, even if he exceeds in terms of requisite force to subdue a witness is still functioning within the perameters of his line of duty.

Now, he may be wrong in that and that leaves

him viably open to an action in the state court for the damages, to which no defense lies to the municipality that he was not an employee once he used excessive force. So, therefore, with those limitations, it goes to the Civil Rights Act whether he was or he was not in the bounds of the performance of his duty. But you can't have it both ways, your Honor.

THE COURT: What you're saying, if the jury were to find he was acting outside the scope of his authority just by having exceeded the guidelines there could be no respondeat superior under claims two and three because he would be acting outside the scope of his authority under claims two and three and he personally would be responsible and not the county of Nassau?

MR. GARDNER: If you accept your Honor's reasons that that's the limitations by which he exceeded his authority by excessive force.

THE COURT: You have a point and that's the reason I raised the question the other day. It's been bothering me for weeks.

Putting the question of malice aside for the moment--

MR. WEITZ: I'm sorry, Judge.

THE COURT: Putting the question of malice aside, it's the question I raised to you the other day, isn't the only thing that Minnel (phonetic spelling) stands for, that if you prove malice then you have Sgt. Sehlmeyer acting outside of the scope of his authority and liable under 1983 as an individual.

But if you don't prove malice or arbitrary action under the law as it now stands you haven't proved a case.

MR. WEITZ: Perhaps I might use the phrase, your Honor, malice or its equivalent.

THE COURT: Yes. I am not taking malice as the only word. I think they used--the Court of Appeals used a couple of words. They used malice, arbitrary manner, or that type of action.

But the defendant's argument--what the defendant's argument is--and I think it may be well taken--if all you have proved and all you have shown is an excess of authority over and above the regulation and/or guidelines, and have not shown malice and reckless and willful abandon and arbitrary action, then under Counts Two, or

Claim Two and Claim Three where you're relying on respondeat superior, if that's what you have shown under Claim One, the County of Nassau goes out under Claim Two and Claim Three, if that's all that is shown, because there is no respondeat superior.

MR. WEITZ: Judge, that's why I have not yet used the term scope of authority. And I think the statute uses the term, color of authority.

THE COURT: That's a different thing. Under color of law is a different thing.

MR. WEITZ: I'm sorry, color of law, Judge.

A person can be arbitrary, can be willful, can be wanton and still be acting within the scope of his authority.

MS. BILLAVER: Not by definition.

THE COURT: No. That's the whole point. I think that's what Minnel (phonetic spelling) is saying to us, if you have proved malice arbitrarily and wanton conduct and reckless conduct, then you get to the jury and you have a 1983 case and you have your Claims Two and Three.

MR. WEITZ: It's a Hopson's choice. Is that

what it is?

THE COURT: No.

MR. WEITZ: That's what it sounds like, your Honor. If I prove one, I lose one defendant. And if I don't prove it--

THE COURT: No. You get them all under Claims Two and Three if you prove that. What you don't get is in the area between that and the acting within the scope of this authority. That's just plain outside the scope of his authority. But without malice and without reckless and willful abandon you might fall safely under Claim One, but you may be out under Claims Two and Three.

MR. WEITZ: I thought that's what I said, Judge.

THE COURT: And my question is: Is that an accurate statement of the law as advanced by Mr. Gardner and his associate?

MR. WEITZ: I feel like a pauper, Judge. Last night at 10:00 o'clock I was speaking with Mr. Freedberg who assured me I would have his memorandum in his case this morning and I was called away from the phone when the Court reconvened and my inquiry was where is the memorandum as promised.

And I can only speak without the benefit of that memoranda. I could read the Minnel case and your Honor suggests I read the Court's opinion on the motion originally. And I cannot conceive that we would be--that such a choice would be imposed upon a litigant.

THE COURT: It's not a choice being imposed upon the litigant.

MR. WEITZ: I don't believe without being able to cite an authority, Judge, that that is the kind of statute and common law that we are dealing with. I understand there are two different things involved here.

I don't think--it seems to me what is being said--and perhaps I do understand it--if I prove a case against 1983 against a police officer that I have not proved a case against the county. If I prove a case against the county I haven't proved the case against the police officer. It seems that's what is being said here.

THE COURT: No, no. Don't misunderstand. That is not what is being said.

If all you have proved is that Sgt. Sehlmeyer acted outside the scope of his authority in doing

what he did, you have not--and if you have not sustained malice, reckless and willful abandon, if your proof does not measure up to that level, then you may--and I underscore the word "may"--have sustained a claim against Sgt. Sehlmeyer under Claim One. I am not sure. Minnel seems to say that you have not.

I will go back and read Minnel again. I am not clear in my own mind--and that's why I asked you fellows to read it--it seems to me what the Judge is saying in Minnel is that you have to prove the extra step. But the charge in the law long before Minnel in Dewitt and Blackmere (phonetic spellings), which are the standard charges, they set forth the two levels of proof.

But you may have sustained a claim under Claim One. But if that's all you have proved, then under Claim Two and under Claim Three you have taken yourself out of the doctrine of respondeat superior because you have said he acted outside the scope of his authority. You may put yourself in the respondeat superior category, though I'm not entirely clear on this question--you may put yourself back if he acted with reckless abandon.

MR. WEITZ: Or in an arbitrary manner.

THE COURT: Yes. But you may yourself--you may be taking yourself out if all you proved is outside the scope of his employment.

MR. WEITZ: I understand what the Court is saying. I am saying that that's not the touchstone here, outside the scope of the employment. I think it's sufficient to show that he acted in an arbitrary manner to make out a prima facie case against the police officer as well as against the County under respondeat superior.

THE COURT: Then you're saying he is acting within the scope of the employment in an arbitrary manner which takes him outside the scope for the Civil Rights Act, but keeps him inside for the wrongful death act--wrongful death action? And that's why I say I think you're correct on that proposition, but I think what they are saying is that if you put the other issue to the jury, outside the scope of the employment issue to the jury, in a charge you may take yourself completely out of Claim Two and Claim Three, which is, as I see it--and I don't want to put myself in the plaintiff's shoes here and practice law here--but I see it as

the only thing that's worth anything to them.

MR. WEITZ: That's true, Judge, that's true, Judge.

THE COURT: We don't have to cross this bridge now because I will reserve decision on the question of malice. I think there is enough where an inference might be drawn and I think I will let it go to the jury, at least on this, at this stage. I think there is enough where you can say, or a jury can say at some point here in the hassle, assuming the hassle occurred, that a malice--malice can be inferred.

MR. WEITZ: Or arbitrary, Judge.

THE COURT: Yes, or arbitrary or willful abandon or recklessly.

And I think you have enough to take this to the jury. So I will reserve--at least I will not deny the motion at this stage. I will reserve decision.

MR. WEITZ: I hope I will have that memo, Judge, that was promised to me.

MR. GARDNER: I would like to proceed now to the Fourth Cause of Action, which is for conscious--alleged conscious pain and suffering.

THE COURT: Yes. I have been referring to the second and third, but it's the second and fourth.

MR. GARDNER: Yes, your Honor; for the plaintiff's failure to prove a prima facie case, and there has been no evidence here that there was conscious pain and suffering at all. There was no medical testimony. The only thing there is in the case is that at some point he was pronounced dead, which does not rise to the dignity that he was alive at any time prior to the time that someone saw fit, whenever they did, and for whatever reasons, to pronounce him dead.

In other words, your Honor, there is no evidence in the plaintiff's case in chief to establish that there is a period of conscious pain and suffering.

MR. WEITZ: If it please the Court, I think the Court will recall the medical examiner's testimony that carbon dioxide--or was it carbon monoxide--was found--carbon monoxide, poisonous gas, was found in the blood and can only come into the blood by breathing it in.

I understand and I do recollect it comes

or could come from breathing air in a parking lot, not necessarily from lying beneath an exhaust. But I suggest to the Court that this is some evidence that this lad was lying on the ground breathing in fumes from the exhaust of that vehicle before he died. And I would say that there is at least some evidence that he lived following this and the time that he was pronounced dead it is 2340.

THE COURT: Where did that appear?

MR. WEITZ: The time of death, Judge?

THE COURT: Yes.

MR. WEITZ: It appeared in my questioning of Sgt. Fehn. He testified--I asked him if he recalled, and I showed him his report, that at 2340 he was pronounced dead.

THE COURT: When is this shooting event supposed to have occurred?

MR. WEITZ: 2230, your Honor.

THE COURT: Where is there any evidence that there was any consciousness which would indicate--not pain and suffering, but conscious pain and suffering?

MR. GARDNER: Even before you get to that

point, your Honor--

THE COURT: Wait a minute, wait a minute. Let's take it one step at a time.

There is no evidence as far as I could see that--

MR. GARDNER: It would require a presumption on the part of the Court that the man did not feel the bullet enter his body, did not feel the bullet course through his body, breaking one rib and going through both chambers of the heart and continuing on out through the other. The Court would have to make a decision that there was instantaneous death.

THE COURT: Instantaneous unconsciousness.

MR. WEITZ: That's what the Court has to decide.

THE COURT: I don't have much difficulty with that.

MR. WEITZ: Pardon me, sir?

THE COURT: I don't have much difficulty with that.

Do you?

MR. WEITZ: Yes.

THE COURT: Well, not really. I hope you

never get hit with a bullet.

MR. WEITZ: Thank you, Judge, for your good wishes.

THE COURT: I don't think there is much room--I don't think there is--go ahead.

MR. WEITZ: I want to address something else to the Court, which I had argued before and I just want to recall to the Court's mind about unduly burdening the record.

I suggested to your Honor when this conscious pain and suffering, that aspect of the cause of action which is something which was the creation of the Legislature in order to vitiate the effects of the harsh rule that when a person dies any action for personal injuries dies with him. And I would say for the facts in this case this young lad, George Haber, had an action for personal injuries from the time this police officer struck him with a blackjack and the handle of the gun.

THE COURT: Are you suggesting that you move to amend your complaint?

MR. WEITZ: I am trying to find a copy--I have a copy, if the Court gives me a moment.

THE COURT: That would be something else again. But it would have to--

MR. WEITZ: If it is not within the ambit of the language of the complaint, Judge, I would move to conform our pleadings to the proof in the case and to amend the complaint accordingly with respect to that action for conscious pain and suffering.

MR. GARDNER: If your Honor please, I am opposed to that.

THE COURT: Well, naturally.

MR. GARDNER: Because in essence what it's doing, your Honor, is permitting the plaintiff to amend his complaint to add an additional cause of action after that cause of action is barred to the detriment of the defendant when that cause of action was completed.

I am of the personal opinion that the Court should look very hard at requests to amend complaints because in essence what it does is to permit plaintiff after evidence comes in to create pleadings to which the opposing party never had an opportunity to respond and it makes pleadings superfluous and unnecessary.

THE COURT: This is not a state court and this is not something that--the facts with respect to the alleged strikes to the head by the blackjack and the gun are not something that have emerged during this trial. They have been known to the defendant for some period of time. And all he is doing really is asking that he be allowed to change this theory of conscious pain and suffering to start from those points in time rather than from the point the gun went off. And I can't see how you can be prejudiced by it.

MR. GARDNER: If your Honor please, the pleadings in this case allege one act, namely, a willful, wanton and intentional shooting.

THE COURT: I don't want or mean to be critical of Mr. Freedberg, and I am not at all critical with Mr. Weitz because I don't think he had anything to do with it, but the pleadings are not artistically drawn in the light of what we all know now that the Supreme Court in Minnel and other cases have enlightened us what the law is, but--

MR. WEITZ: May I just state since you mentioned the gentleman's name, he did not draw

the pleadings in this case. My office had nothing to do with the pleadings in this case.

THE COURT: It was Mr. Leonard Sheff's (phonetic spelling) office?

MR. GARDNER: Yes.

MR. WEITZ: Yes.

MR. GARDNER: I am alleging, your Honor, to the cause of action for conscious pain and suffering. In that first cause of action they adopt the first eleven paragraphs of the complaint. And the Court has so far been--to which I will direct my argument in a little while.

All they do, your Honor, is adopt one claim as far as the action upon which they are seeking recovery and that claim is very simply a willful, wanton, and intentional shooting, period; not an assault, not negligence. Negligence is not claimed anywhere in the complaint, nowhere.

THE COURT: Well, does not the greater include the lesser?

MR. GARDNER: I submit, your Honor, a claim of negligence is not included under the language of the state case that I can see of wanton and willful. One is an intentional tort

and the other is an unintentional tort. So, therefore, if you're claiming a willful wanton and intentional shooting, you're alleging an intentional tort which negligence is not.

As I understand the law, negligence is an unintentional act. And that's the difference between intentional torts and unintentional torts as I see it.

The plaintiffs, they had information available and they were the ones who drew the complaint and they were the ones who alleged an attempt to gain on that cause of action a recovery for conscious pain and suffering for willful and intentional shooting. That's all they said.

MR. WEITZ: It was also alleged to be reckless.

MR. GARDNER: In response to Mr. Weitz, the cases in New York do not recognize the word "reckless" by itself, unless it is used in conjunction with the term negligence in order to show an unintentional tort.

The second part of my argument is there certainly is a lack of evidence to indicate there was any capacity of Mr. Haber to intellectually

appreciate that in fact there was in fact any injury to him. If anything, it's totally to the contrary.

So the conscious pain and suffering at the least has to be something that's appreciated so you can't have a conscious pain and suffering against somebody in a vegetative state or you can't have a conscious pain and suffering to somebody who cannot consciously receive. All the testimony was that he was high or spaced out and the autopsy indicated there was no reaction as to any response Haber felt.

THE COURT: This last witness indicated to the contrary when he was yelling for mom. Maybe it's an hallucination. But the inference could be drawn that he was feeling some pain at this point.

This is unlike the case where you have a fellow who has 3.9 percent alcohol in his veins, or what have you, and he is feeling no pain. At least the testimony so far doesn't come in that a person under the influence of LSD feels no pain.

MR. GARDNER: What it takes is positive proof of a medical expert on the stand. I didn't

have to tell Mr. Weitz to put somebody on the stand and say, in your opinion, Doctor, with that amount of LSD, do you have an opinion as to whether he could perceive any opinion. The answer is yes or no.

MR. WEITZ: You're the one who was arguing because of the LSD he was feeling no pain. But there was lay testimony as to what his actions were at the time.

THE COURT: I think I have to take the inference most favorable from the lay testimony in favor of the plaintiff.

I think we better let the jury go to lunch until we finish this. So maybe we better get them in and then I will excuse them and they can go to lunch.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

THE COURT: We are still discussing certain legal matters ladies and gentlemen. And it's now 1:00 o'clock. We will not hold you up as far as your lunch hour is concerned. You go to lunch. If we run a little over, it's because we are still

here. I hope we are not still here, but because we are here a lot longer than expected, and come back at 2:15.

Thank you.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: Striking the words, quote, wrongful death, what is your position with respect to Count Two or the second cause of action or claim, or however you want to denominate it?

MR. WEITZ: Are you addressing yourself to me or Mr. Gardner?

MR. GARDNER: It is my position, your Honor, that number two cannot stand if number one goes because it's also a derivative action.

THE COURT: No. As I understand the law once the trial starts and once you have in effect accepted jurisdiction as to one, the Court proceeds to determine all--just because he fails under one doesn't mean the other two go.

MR. GARDNER: If your Honor please, if you look in the language of the cause of action designated as number two, it's similarly repeats

and realleges the acts of the paragraphs of the first cause of action, namely, that action number two similarly seeks recovery for a willful and intentional act. There is no claim of negligence there.

THE COURT: Well--

MR. GARDNER: And I fail to see any claim of negligence that in any way characterizes one for wrongful death. There is no language set forth here that indicates wrongful death.

As I view it, it's an action on the part of the--it's difficult for me to analyze it, your Honor.

THE COURT: Well, it was caused to lose support that a father expects from his son. Those are the key words as far as I can understand it for the wrongful death action.

MR. GARDNER: As to loss of services, there is no indication for a wrongful death having occurred. There is no language.

THE COURT: Well, yes, without justification willful and wanton shooting of his son and then asks for support that he would have received is again not very artistically worded, but probably

sufficient in the Federal Courts.

MR. WEITZ: Might I point something out, your Honor?

The pretrial order--I am not saying this facetiously, just a statement of fact--which I have been bound to, and that, of course, is your Honor's ruling, and I am not arguing those rulings. I am just making reference to the fact that obviously everybody who came in to discuss this case and discuss these issues under page twelve, I think it's article five of the pretrial order, speaks of three separate types of claim, one for deprivation of civil rights, one for negligence, and then going on to page thirteen, one for cause of action for assault. Whatever labels we want to give these actions, we want to give these events, these are the issues all of us understood are involved in this case and these are the types of acts all of us understood are the disputes in this case.

THE COURT: Which is the claim for assault?

MR. GARDNER: He is talking about item number C on Page 13.

THE COURT: Wait a minute.

Where is the claim for assault, Mr. Weitz? If we assume the second claim for wrongful death and the fourth claim is for negligent personal injuries, where is the claim for assault?

MR. WEITZ: Where is it separately stated?

Your Honor, it is not separately stated.

THE COURT: It's in the negligence?

MR. WEITZ: Yes, it's in the negligence, in the negligence. But I was only directing the Court's attention to--

THE COURT: I agree. I am not going to read this pleading like they might have done twenty years ago or twenty-five years ago in the state courts. I don't think I can, even if I wanted to, which I don't.

MR. GARDNER: My record is clear, your Honor. My motion is directed to a dismissal of all the causes of action in this complaint for the plaintiff's failure to prove a prima facie case. I have submitted my memoranda of law, your Honor.

THE COURT: I will read the memo and reserve decision. I think even after I read

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the memo you can assume that the decision has been reserved and we will be left with taking the balance of the proof of the case. At the conclusion of the entire case I may have a much more difficult time than I have now, depending on what the balance shows. But between now and the conclusion of the case, Mr. Weitz, particularly, you will have to give me some of your thinking on this--

MR. WEITZ: I hope to have something within a matter of an hour.

THE COURT: --this gap and--

MR. WEITZ: I'm sorry I interrupted the Court. I would like to hear your Honor state it again so I can define it for myself.

THE COURT: Look at Dewitt and Blackmere (phonetic spelling) or have Mr. Freedberg look at Dewitt and Blackmere, Section 87.14, Page 298, where they set forth the issues to be determined in a typical civil rights case.

First they said, and they knowingly applied force to the plaintiff as they admit they had done, but this is not applicable here necessarily, did the defendants act outside the bounds or limits of their lawful authority under state law

or county ordinance or under some regulation.

If your unanimous answer to this question is no, the jury should return a verdict in favor of the defendants.

If your unanimous answer is yes, you have a second answer to determine, did the defendant suffer--by reason of the illegal act and conduct of the defendants. And if your unanimous answer to this question is no, verdicts for the defendants.

If your verdict is yes, you have to then determine actual compensatory damages.

Then they go on and say that if you find for the plaintiff and award him anything, you have to then determine whether the acts and conduct of the defendant toward the plaintiff at the time and place in question were maliciously or wantonly or oppressively done, and if so, what amount, if any, of punitive damages you have to award.

And Mr. Leonard, it appears in the way he constructed the complaint in that that may not apply here, but anyway forgetting whether he appears to recognize it or not, it appears to be that what Minnel says is to get to the jury in a case involving an officer who is alleged to have acted in

his individual capacity, one must prove a punitive damages case, oppressive malice, one.

If one proves only that he acted outside the scope of his authority, then query, do you get to the jury under claim one?

MR. WEITZ: I understand. That's what we have spoken about before.

THE COURT: And then, query, assuming you have achieved that and assuming you say you are right in your assumption, you prove outside the scope of your authority and you don't prove the punitive damage case, then you fail there and you recover under claim one, can you recover under claim two because you have proved that he acted outside the scope of his authority and, therefore, the County of Nassau is not responsible?

MR. WEITZ: It would be an inconsistent verdict in effect.

THE COURT: What?

MR. WEITZ: I understand what your Honor is saying.

THE COURT: And the same as to Count Four because the acts are not those of Nassau County.

And Mr. Gardner goes one step further and

says a fortiori, that if you prove that he acted with malice and with reckless abandon, he has, a fortiori, acted without the scope of his authority.

And have you not run yourself out of Count Two and Count Four?

MR. WEITZ: I understand that, Judge. But I think--well, I will submit a memo as to our position.

I believe that a prima facie case has been made out, but that it would be inappropriate for--I believe that this jury could make any one of those findings based upon the evidence thus far adduced, and it will be a question of fact as to which one they are going to decide, what they are going to decide did in fact take place.

THE COURT: Well, Mr. Gardner's question to you is through me, if you're employed by Nassau County and you go out and shoot somebody with malice, why should Nassau County be responsible for the wrongful death or pain and suffering under anything? Because you have done something that is wholly outside the scope of your--

MR. WEITZ: But if they allow him to have a

weapon, they put him in the uniform and they send him out with the authority and then he acts in an arbitrary manner or a wanton manner, I think he fits under all the categories, even if he wasn't--it may be an equivalent of malice without the actual mental process of malice.

MR. GARDNER: What Mr. Weitz is suggesting to your Honor, he says if they gave him the equipment and put him out, he is suggesting, notwithstanding he is acting outside the scope of his authority by being malicious, that a course of action has to arise against the County because of negligence they--

THE COURT: That's his third course of action he may wish to reinstate.

MR. WEITZ: That's not what I am saying, Judge. I am saying if they put him on the path and put him on the place and they gave him a duty to perform--

THE COURT: And he goes out and goes beserk?

MR. WEITZ: Beserk?

THE COURT: In effect that's what you're saying.

MR. WEITZ: I don't think he has to go that far. I don't believe we require that he has to go

beserk, as I understand the meaning of the word beserk. And I have found a lot of semantics in this case as to what different words mean. But as I understand the word beserk, I don't believe he has to go that far.

THE COURT: He goes--

MR. WEITZ: I understand your Honor is saying where he gets to a point is when he says, almost, now I am abandoning my work as a police officer and I am going to act against this individual.

THE COURT: Yes, I am going to go get that guy.

MR. WEITZ: Yes, I think in such a hypothetical clear cut situation, of course, he is not--the doctorate of respondeat superior wouldn't apply. But I think he would have to actually abandon his position to do that and I think at all times he acted as a police officer.

THE COURT: As soon as you say that--

MR. WEITZ: Judge, could I brief it for you? Because it gets to be--

THE COURT: I think what you're saying--

MR. WEITZ: --an exercise that I can't--

THE COURT: --is that there is two--

MR. WEITZ: --but, Judge--

THE COURT: --and one for the question of the Civil Rights Act and one for the question of respondeat superior.

MR. WEITZ: Yes. That's why I used the phrase color of law before.

MR. GARDNER: If your Honor please, I don't want to inundate the Court, but your Honor requested that we put in requests to charge. And in view of your Honor's reservation at this time, I submit to your Honor the requests to charge we have today.

THE COURT: You don't have to give it to Mr. Weitz until he is ready to exchange it with you.

MR. WEITZ: When I have mine we will exchange them.

THE COURT: Yes.

MR. GARDNER: What time, your Honor?

THE COURT: Try to get back as close to 2:15 as you can.

(Luncheon recess.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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HABER, :

-against- : 73-C-1408

NASSAU COUNTY, :

Defendant. :

==========x

United States Courthouse
Brooklyn, New York

May 5, 1976
3:20 o'clock p.m.

B e f o r e :

HONORABLE HONRABLE THOMAS C. PLATT, U.S.D.J.

HENRI LE GENDRE
ACTING OFFICIAL COURT REPORTER

Appearances:

HARVEY WEITZ, ESQ.
Attorney for Plaintiff

JOHN GARDNER, ESQ.
-and-
BARBARA BILLAVER, ESQ.
Of Counsel
Attorneys for Defendant

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THE CLERK: Case on trial, Haber v. Nassau County.

THE COURT: Literally, since two o'clock I had two very important applications I have had to entertain by reason of being Miscellaneous Judge, one of which was meeting a three o'clock deadline. The other was meeting a two thirty deadline.

I have had to keep everybody waiting, no way I could avoid it. I am sorry.

MR. GARDNER: The Plaintiff having rested we are prepared to proceed.

G E O R G E A N T H O N Y D U Q U E T T E , having been first duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Mr. Duquette, will you please speak loud enough to this young lady on the end can hear you and we won't have to repeat your answers?

A Right.

Q How old are you now?

A I'm 25 now.

Q How old were you on the 29th of September 1972?

A 21.

Q Did you know George Haber?

A Yes.

Q Was he a friend of yours?

A Yes.

Q Where did you live on the 29th of September 1972?

A I lived at 73 Robert Pitt Drive in Munson, New York.

Q And where did George Haber live?

A He lived on Samuel Drive in South Spring Valley, New York.

Q Spring Valley area, State of New York?

A Yes.

Q About 14A on the Thruway, around that area?

A Yes.

THE COURT: How far away did you live from him?

THE WITNESS: Three miles away.

Q On the 29th of September 1972, did George Haber meet you at your home?

A Yes, he did.

Q Was there a third party in the group?

A Yes, there was.

Q Who was that?

A Robert Lewin.

Q And did you have a ticket on that evening for a rock concert at the Nassau Coliseum out in Nassau, Long Island?

A Yes, I did.

Q To your knowledge, did George Haber have a ticket?

A Yes, he did.

Q Did there come a time that you and George and your other friend did leave Spring Valley or Munson, traveled out into Long Island to the Coliseum?

Yes.

Q In fact, you took a van to go; is that right?

A That's right.

Q To your knowledge as of September 29, 1972, did George Haber take drugs?

MR. WEITZ: Objection.

THE COURT: You mean on that date?

Q From your experience with him -- I withdraw it.

Did there come a time when in fact you went into the Coliseum and George Haber accompanied you and your other friend to the Coliseum?

A Yes.

Q Did George Haber have a tab or tablet of acid with him?

A Yes, he did.

Q Would you be kind enough to tell the ladies and gentlemen of the jury what a tab of acid is in simple language as you can?

A It's a little saccharin shape pill, blue in color.

MR. WEITZ: Could we have that repeated?

(Reporter read back answer as requested.)

Q Tell us what acid is.

A lsd.

Q What is LSD as far as your knowledge?

A Hallucinogenic drug.

Q What does it do, to your knowledge?

A To my knowledge, it affects the central nervous system.

Q In addition to the acid that George Haber had, did he also have marijuana that evening at the Coliseum?

A Yes, he did.

Q Could you tell us approximately how many sticks of marijuana he had?

MR. WEITZ: Jay had?

MR. GARDNER: Physically had on his possession.

MR. WEITZ: Can we have the circumstances under which he observed the possession?

THE COURT: So far he had in his possession this saccharin pill. Did you see him take it at any time?

THE WITNESS: When we are inside the Coliseum he opened up a tiny piece of aluminum foil, I assumed that was the tablet.

THE COURT: Did you see the tablet itself?

THE WITNESS: When he took it?

THE COURT: Did you see the tablet?

THE WITNESS: Beforehand.

MR. WEITZ: Did he say before or did he say at --

THE COURT: He said when he was in the Coliseum he saw him unwrap and have the tablet in his hand; right?

THE WITNESS: Right.

Q Now, the tablet was in aluminum foil, was it not?

A Yes.

Q That's the way it's usually sold on the street?

A A single tablet; yes.

Q Did you see him open up the aluminum foil and take the contents, what was in the aluminum foil and ingest it?

A I didn't see him digest it.

Q What did he do when he opened it?

A I don't know. I was watching the show.

Q Of the seven sticks of marijuana --

Q Did Haber have any marijuana on him?

A I had a few joints.

Q What do you mean by joints? What is a joint?

A A cigarette.

THE COURT: It's a what?

THE WITNESS: It's a marijuana cigarette.

Q So instead of calling it a cigarette it's made with marijuana, it's called a joint.

A That's what it's called.

Q Does that mean there is marijuana wrapped around a cigarette paper?

A It's inside of the paper.

Q How many did George Haber have that evening in the Coliseum?

MR. WEITZ: If he observed it.

THE COURT: If you know.

A I would say four, five.

Q Did you see George Haber smoke the marijuana?

A Inside, yes.

Q How many joints did you see George Haber smoke inside the Coliseum on the 29th of September 1972?

A No way of really telling. It was marijuana passed out from everybody around the whole area.

Q The whole area, that's the area that you were in?

A Practically the whole hall was that way.

Q Did you see him smoke marijuana?

A Yes, I did.

Q What time was that inside the Coliseum on the 29th of September 1972 that you observed him smoking marijuana, approximately?

A It had to be after 8:00 o'clock.

Q Was that before or after you saw George Haber open up the aluminum foil in which the LSD was?

A No; he did that first.

Q Did what first?

A Was opening up the aluminum foil first. When the lights went out the show went on.

Q When the lights went out and the show went on?

A That's when the smoking started.

Q And that was after he opened up that packet and took whatever was in the aluminum foil?

A That's correct.

Q And now, did you stay with George Haber for the rest of the evening after he had opened up the aluminum foil and taken that tablet out and had smoked the marijuana?

A Did I see him?

Q The rest of that evening.

A Not for the rest of the evening. I saw him for

approximately one and a half acts; in the middle of the second act he got up. I don't know where he went.

Q How was he acting at that time?

A We were dancing when the music was playing. We were just dancing along with the music; a few times he raised up his hands like he was into music and that was it.

Q Did you see where he went?

A No; not when he got up and left.

Q How far upstate, Spring Valley, from where the Coliseum is?

A Good hour and a half ride.

Q Did you have a discussion with him as to whether or not you would take him back home?

A Yes, it was understood we would all come back together.

Q He didn't have a car of his own; correct?

A Correct.

Q When he left your side and the concert was over, where was George, the guy you brought down there, the guy you were going to take back up?

A I stayed around the parking lot for at least two hours.

Q Did you ever find him?

A No.

Q Then what did you do?

A We left. We figured he met somebody that he knew and was going home with them.

Q You assumed that, you didn't know that?

A We didn't know.

Q So all you knew he was supposed to go back with you and you couldn't find him any more?

A That's correct.

Q You left and went back home?

A That's correct.

MR. GARDNER: That's all, your Honor.

CROSS-EXAMINATION

BY MR. WEITZ:

Q Mr. Duquette, have you and I ever met before?

A I don't remember.

Q The first time I spoke to you as far as you remember is when I asked you your name when you were seated here?

A Today.

Q Did you ever see see me before that, did you know who I was when I walked over to you?

A No.

Q Mr. Duquette, do you still live up in Spring Valley?

A Yes.

Q Are you married?

A No.

Q Were you married?

A Yes, I was.

Q Do you have an occupation, Mr. Duquette?

A Yes, I drive a taxi.

Q How long have you been driving a taxi?

A About two years.

Q Do you support yourself driving a cab now?

A Yes.

Q Mr. Duquette, you were asked some questions about what you call acid; you mentioned something about a pill. Would you be good enough to tell us if you know, do these pills come in different dosages, in different shapes?

A In a clinical setting they are, but out on the street they are more or less -- they range -- there is a range, you can't really tell how much a dosage is unless you test it chemically.

Q Well, you told us something about marijuana, you used the term joint; is that a cigarette that is rolled with cigarette paper around a quantity of this weed; is that right?

A That's right.

Q Now, are there different kinds of marijuana?

A Depending on where it's grown, what country.

Q Different potencies?

A Yes.

Q Have you smoked marijuana, sir?

MR. GARDNER: I think it would be appropriate, I don't know the sophistication of this witness. It might be appropriate to instruct him.

MR. WEITZ: I withdraw the question.

Q From your knowledge, Mr. Duquette, are there different kinds or different potencies of marijuana?

A From my knowledge there are.

Q Some have a slight effect, some have a greater effect?

A That's correct.

Q And even from individual to individual, from your knowledge there are different levels of effect?

A That is so.

Q Does the same hold true with LSD or acid?

Let me rephrase it.

Are there different kinds of acid or is there just one kind of acid?

A To the best of my knowledge there is only one kind. It's the dosage that makes the difference.

THE COURT: It's the amount in the pill?

THE WITNESS: That's correct.

Q Now, sir, you were asked about the effect of LSD: Is that something that has an immediate effect or delayed effect or what?

A To my knowledge it would vary according to the individual.

Q Well, now, when you used the term hallucinogenic, could you tell us in terms that we as laymen might understand what you mean by hallucinogenic? What do you see or observe in a person -- or about a person who has used or ingested this particular substance, LSD?

MR. GARDNER: I object, only, if your Honor please -- it would depend upon the dosage.

Q Tell us the range and standard dosages that you have seen.

A What does he mean by laymen?

THE COURT: Have you ever seen anybody that you know who just ingested LSD and if you have, have you observed their behavior for any period of time and if so what that behavior is. You could take them separately.

Have you ever seen anybody under those conditions?

THE WITNESS: At huge festivals.

THE COURT: The question is: Have you ever seen somebody take a dosage and they say an hour later, observed their behavior and describe their behavior as being a consequence of that or something you presume? We don't want anything that you have guessed at.

THE WITNESS: To my knowledge, I would have to say it really depends more on the individual; some people will seem to be quite normal. You wouldn't know they have ingested a hallucinogenic drug.

Q Have you observed other than a state where some people seem to be quite normal?

A Just maybe jubilism.

Q Is that what you meant before when you said 'into the music"?

A Right.

Q Let me take the marijuana for the moment. Have you ever seen the effects that the marijuana has on people?

A Not really, I never really looked to notice.

Q Could you tell this jury that on this night in answer to Mr. Gardner's question, that the whole area was filled with people using marijuana? Did you tell us that a few minutes ago?

A Yes.

Q And marijuana has a distinctive odor, doesn't

it?

A Yes.

Q When the house lights went down you told us everybody was lighting up joints. Didn't you tell us that?

A A lot of people.

Q And this was the first time you ever saw such an occurrence, was it, sir?

A No.

Q So you know from your own experience what people act like when they use marijuana because you have seen it before; isn't that true?

A They act the same as anybody else does.

Q Isn't it a fact that they are somewhat disoriented?

A I never came across anybody like that.

Q Isn't it a fact that they are spaced out, to use the vernacular?

A The vernacular is used to describe someone who is high.

Q And it's a lethargic or lazy kind of high; isn't it, sir?

A That I can't tell, it depends on the person.

Q Well, you have seen that, haven't you, sir?

A I presume so making it must make them very

relaxed.

Q And you have seen it even affect their coordination, haven't you see that, sir?

A No, I haven't.

Q How about LSD? Have you seen people use LSD?

A Yes, I have.

Q And would you tell this jury when you have seen people use LSD what effects you have observed in such people?

A Their behavior is sometimes not normal.

Q You mean disoriented?

A Somewhat.

Q Out of contact with reality?

A For choice of a better word; yes.

Q Uncoordinated?

A That's correct.

Q Sometimes you have seen them so weak that they could barely move; isn't that so, sir?

A That can happen, yes.

Q And you have seen that even from the use of marijuana, haven't you, sir?

A I don't think I would compare the two.

Q The effect of LSD is stronger?

A Much more stronger.

Q And, sir, would you say on this night when the lights went down and the people lit up that there came a time that that whole arena was pervaded with the smell of marijuana?

A That's correct; true.

Q And would you say, sir, that back in 1972 when these rock concerts were being held at the Nassau Coliseum, it was the custom of the people attending that Coliseum to participate in the use of marijuana?

MR. GARDNER: Objected to. It's not relevant to this lawsuit.

THE COURT: I'll sustain it; yes.

Q When you said before in answer to Mr. Gardner's question as to the number of joints or sticks -- incidentally -- I'm sorry -- the number of joints or sticks you had, that wasn't that George Haber had seven joints, that was between you, George and Robert Lewin; isn't that true, sir?

THE COURT: Wait a minute.

Mr. Duquette, I don't know if you have consulted with an attorney but you have a right not to answer questions if you feel they might in any way tend to incriminate you, and so that if you want to -- you don't have to put it on that grounds, if you want an opportunity to consult an attorney, I'll allow that.

THE WITNESS: I'd rather not answer the question.

Q Well, sir, let me ask you this: As far as the number of cigarettes, marijuana cigarettes that George Haber had, you are not saying that he had seven, are you?

THE COURT: I think he testified to four.

MR. GARDNER: He said Haber had four.

Q Well, sir, did you give a statement -- before you testified here today, were you given a statement to read over by Mr. Gardner?

A Yes.

MR. WEITZ: Can I have the paper that you gave me, have it marked for identification.

THE CLERK: Three-page statement marked for identification, 44-page statement marked as Plaintiff's Exhibit 30 for identification.

Q I show you Plaintiff's Exhibit 30 for identification and ask you if this is your signature at the bottom of the first page?

A Yes.

Q Is that your signature on the second page?

A Yes.

Q Is that your signature on the fourth page?

A Yes.

Q Did you make this statement at the police

station?

A Yes.

Q Did you give them a statement as to the night of September 29, 1972, as you remembered them?

A Yes, I did.

Q You have read this statement?

A Yes.

Q Did you tell the police that George Haber had four sticks of marijuana? Will you reax this over in case you need to refresh your recollection about it.

A It doesn't say anything here.

Q Now, Mr. Duquette, will you tell this jury when these sticks of marijuana are made, they're also made in different sizes, aren't they, sir? Some are thicker, some are thinner?

A They can be.

Q They are not like regular cigarettes that we see in a package of twenty cigarettes, which I don't know what they are, quarter of an inch thick, three-eighths of an inch thick; they're not li[illegible]t, are they?

A They can be made that way if you have a machine or something to make them.

Q They are usually very thin, aren't they, sir?

A Depending on how big you would want to make it,

I assume.

Q Different sizes, different shapes?

A Right.

Q And the marijuana smoking in public, when they smoke they pass the stick around, don't they?

A Not all the time.

Q They wrote a song about it, didn't they, "Don't Bogard a joint," about passing the stick around?

A They wrote it for some people.

Q That's the customary way to smoke those things, isn't it, sir, by passing it around?

A It depends on the setting, I presume.

Q You couldn't tell this jury because the lights went out how much, if any, marijuana George Haber consumed that night, could you?

A I didn't say how much he consumed.

Q And as far as the tab of LSD that he took, or that you presumed that he took, didn't actually see him digest it; is that correct?

A Yes.

Q You saw him open it?

A Yes.

Q Tell us what the dosage size, strength of that was any way you can tell us.

A No way you could tell what strength.

Q Had you ever seen George take or consume or ingest this particular occasion LSD before that night?

A I didn't see him take any.

Q You never had. So you have no way of telling us -- the only thing you observed about him that night is he was, as you call, "into the music"?

A Yes.

Q What do you mean by "into the music"? Tell this jury what that means.

A The rock music has a certain basic beat or rhythm and people like to get up and dance to it. It has a rhythm to it; some people when they are having a good time, it's good music, they get up and dance to it. That's what a lot of people were doing.

Q Including George?

A Right.

MR. WEITZ: I don't have anything further, your Honor.

REDIRECT EXAMINATION

BY MR. GARDNER:

Q Mr. Duquette, when LSD is purchased on the street, there is no way that a young fellow can know the dosage of that particular drug that he bought?

A That's right, there is no way.

Q He doesn't know whether he got a short dose or whether he got an excessive dose; is that right?

A True.

Q Some people who buy drugs on the street, on the street they're pretty much at the mercy of what a guy is who sells it to him?

A That's true.

Q Every time somebody takes one you take a chance because you don't know how much you are getting?

A That's right.

Q And the same thing about the strength of the marijuana; true?

A True. It's a little risk.

Q Mr. Weitz, having seen fit to ask questions about this statement which is now marked for identification, Plaintiff's Exhibit 30, I offer it in evidence.

MR. WEITZ: I would object to it, your Honor.

THE COURT: You'd better step up here, gentlemen.

(Whereupon, a side bar conference was held.)

THE COURT: I think he already asked that one question, whether there was something in there, and the fellow said no.

MR. WEITZ: I didn't say it that way. I asked

him does it refresh your recollection.

MR. GARDNER: You keep doing this to me.

THE COURT: I remember. You didn't ask whether it refreshes your recollection. You said is there a statement in there to the effect the amount of marijuana cigarettes or sticks you had in your possession, he said no.

MR. GARDNER: Which George Haber had.

MR. WEITZ: That may be what I said. I thought I put it some other way.

THE COURT: But how does that get you to put a statement in unless there is a statement in there that he had umpteen cigarettes?

MR. GARDNER: It suggests to the jury that there is nothing in there about marijuana.

MR. WEITZ: What I am objecting to is this. You see, I attempted to -- where I point out where it has the remark which is in issue --

MR. GARDNER: He is suggesting there is a prior inconsistent statement. That's what he's suggesting.

THE COURT: Well, I would think the point certainly about -- "we saw marijuana passed around, we had some joints of our own."

MR. WEITZ: No objection.

THE COURT: On the way down to the Coliseum, the music, drugs and other things.

MR. WEITZ: I object to that. I asked him about one thing.

THE COURT: " I saw George had one."

That sentence would be permissible. You could read that sentence.

MR. GARDNER: I think it's all admissible.

THE COURT: No. There was no cross-examination of the statement, as such. This one sentence is the only sentence. "We saw Ramadan --"

MR. WEITZ: Your Honor, I started to ask about that.

THE COURT: He doesn't have to answer about himself.

MR. GARDNER: He waived it.

THE COURT: He waived it? You didn't tell me that.

MR. WEITZ: I wasn't the one who objected originally as to that.

THE COURT: All right.

(End of side-bar discussion.)

REDIRECT EXAMINATION

BY MR. GARDNER (Cont.):

Q This statement that you gave on October 2, 1972, is that the police area in Muncie?

A Yes.

Q Did you say in the statement, "We saw Ramadan and Edgar Winter"; I take it those are two groups. "During the performance marijuana was being passed around. We had seven joints of our own. We all smoked our own and whatever else was passed to us."

Did you say that?

A Yes, I guess I did.

Q Did you say George Haber smoked marijuana of the seven joints that the group had as well as other marijuana that was passed around?

A That's correct.

MR. GARDNER: No further questions, your Honor.

MR. WEITZ: Your Honor, I have a few questions.

RECROSS-EXAMINATION

BY MR. WEITZ:

Q And, sir, you smoked as well, according to this, didn't you?

A I said we had smoked the seven joints. I didn't say I had.

Q When you said "we" -- "We all smoked ourselves and whatever else was passed to us," the "we" includes yourself; true?

MR. GARDNER: If your Honor please --

Q Did the "we" include George Haber?

MR. GARDNER: I am not his lawyer. We are interested in this case only what George Haber did. I don't think it's necessary.

THE COURT: Ask him about George Haber.

Q Did the "we" include George Haber?

A Yes.

Q Did the "we" include persons other than yourself?

A When I gave him that statement at that time I had been pretty nervous about everything that had happened, and I guess I said "we."

THE COURT: The question is not only did it include Haber, did it include the other people that were with you, not counting yourself for the moment?

THE WITNESS: Yes; people all around.

Q And when you said "We saw Ramadan and Edgar Winter" who did you have refemence to when you used the term "we"?

A Whoever was sitting there in our row.

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Q When you said "we," you meant the people in the Nassau Coliseum?

A The people that were around us, some friends a few rows down.

Q And you included yourself in that group?

A Right.

MR. GARDNER: He keeps pressing him on that point.

Q I'm asking you, when you said, "We saw Ramadan and Edgar Winter during the performance marijuana was being passed around, we had some joints of our own, we all smoked ourselves and whatever else was passed around," sir, is it true that you are fully familiar with the effect of marijuana on people who smoke it?

A I'm somewhat familiar. I am not a scientist.

Q You know it makes you lazy, lethargic?

MR. GARDNER: Objection, your Honor.

THE COURT: Yes.

MR. WEITZ: I won't pursue it any further.

THE COURT: You may step down.

C A T H E R I N E K R A G A N , having been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q State your name for the record.

A Catherine Kragan.

Q You were subpoenaed to come to Court today by my office?

A That is correct.

Q Have you and I ever discussed this matter at any time before your arriving in court some time around 2:00? Have you met me before?

A No.

Q When you came to court at 2:00 o'clock, I asked you if you want to look at the statement of what you said to the District Attorney?

A Yes.

Q And you said you wanted to look at it?

A Right.

Q Having looked at these two statements, have we discussed this matter before?

A No.

Q Have you discussed this matter with anyone from

my office prior to your sitting on that stand, other than your having read these two statements?

A No.

Q Now, Catherine, on September 29, 1972, how old were you?

A Fifteen.

Q Were you going to school?

A I was in high school.

Q High school girl, fifteen years of age.

On that evening, were you at the Nassau Coliseum?

A That's correct.

Q Will you tell us, tell the members of the jury in your own words, in your own language, at your own pace, what occurred to you that evening, fifteen-year-old high school girl, what you did?

MR. WEITZ: Objecting to the form, Judge. What occurred to you, a fifteen-year-old high school girl.

Q All right. You were fifteen on that day?

A Yes.

Q And you were a high school girl?

A Yes.

Q And you were at the Coliseum?

A Yes.

C Tell the ladies and gentlemen of the jury what happened to you that evening, what you did, everything you recollect on the evening of the 29th of September, 1972 at the Nassau Coliseum, and please, Catherine, loud enough so they all can hear you?

A My girl friend, Joanie, and myself went to see a concert which a friend of ours had driven us. We had to leave the concert early to get our ride home. We went to the concert, it was about 7:30, 8:00 o'clock, and we went and listened to the concernt, and then we left, it was about 11:00 when we left to meet our ride.

When we left the building, Joan had said that we had to go to the left. I said no, we had to go to the right to meet our ride at the gate. So I said, "All right."

So we went to the left and we got down and it was just a fence. We turned around and we were laughing about it because we went the wrong way. We were walking back towards the gate when I heard a car door slam and this kid running. He looked like he was trying to get the car, it was a boy. He was about my height, and then I was watching him out of the corner of my eye, not turned completely around.

He started waving his arms up in the air wildly. He looked like it was a surprise on his face to see us walking, so we were down by the last flower box and he came up

to us and Joan said, "Cathy."

We turned around. He looked at both of us and he grabbed Joan by the arm and she said, "Please, let go of me."

He didn't say anything. Then I grabbed his arm and I dug my nails into his arm and he looked at me and he grabbed me in the rear.

Q You say he grabbed you in the rear. I know it's difficult for a young lady, but this is very important to everybody here.

Tell the jury. Don't worry about the language you use.

A He grabbed me on the ass, right on my ass.

Q Was it light, dark, the lighting at that time?

A I don't remember.

Q When you felt his hand on your backside, how did you feel about that?

A I didn't like it.

Q What did you do?

A I pushed him away.

Q What did you do then?

A Then we started to run. I knew he was there. Joanie said he was following us like chasing us. And we seen a cop's car. We went over to the car and we told the cop what was happening and we were excited about it, and we were

both talking at the same time.

He said, "Start over, what did he do?"

So we told him he grabbed Joanie and grabbed me.

And he said, "Okay," and I was assured that he would go over there in that general direction to check out the situation and we ran off laughing about it.

Q Now,did you indicate to the policeman any way where this man, this person was that you had told the policeman that had grabbed Joanie and you in the rear?

A We said a few aisles back.

Q Then did you point to the aisle?

A I pointed but it was over the car. I guess he could tell which way I was pointing.

Q What did the policeman do?

A He said, "All right."

Q Did he go in his car, go anywhere?

A He started to turn, we left.

Q You didn't follow the policeman?

A No.

Q And that's all you know of the incident?

A Yes.

Q I'm going to show you a picture that was marked in evidence No. 19, Exhibit 19. I'm going to ask you whether you recognize that face?

A Yes, I do.

Q Who is it?

A That's the man that approached us in the parking lot of the Coliseum.

Q Is that the man that grabbed your friend, Joan?

A Yes.

Q Is that the man that put his hand down on your bottom, as you described it?

A Yes, that's correct.

Q Was it after that event that you complained about those two things to the police officer?

A Right.

MR. GARDNER: Nothing further, your Honor.

CROSS-EXAMINATION

BY MR. WEITZ:

Q I'm going to ask you a few questions, Cathy. If I ask you something that you find embarrassing, try to give us particular details.

You have never spoken to me before?

A No.

Q Before you testified, you were shown some papers to help you refresh your recollection for the events of that evening. So we have the record clear, I'm not saying that you were mistaken, you were one month short of sixteen

at the time?

A Yes.

Q So you were fifteen years, eleven months?

A About two months, almost.

Q Well, your brithday is November 2nd?

A Yes.

Q And this happened Septembet 29th?

A All right.

Q So it's one month as I suggested to you and a couple of days, right?

A Correct.

Q That's what I meant when I said I want to get the record correct.

When you left the concert that evening -- that was Joan Muller -- the two of you had attended and had listened to what was going on inside?

A Right.

Q Could you tell us where did you have your seats? Did you have it upstairs, downstairs or what? The Coliseum is like one straight up?

A Either the first or second row.

Q By the way, did you smell any peculiar odor in the Coliseum that night?

A I don't recall but it was probably there.

Q You smelled the pot that night in the Coliseum?

A I don't recall, but it was probably there.

Q And by pot you understand me to mean marijuana?

A Right.

Q And you were there for how long?

A Roughly three hours, maybe.

Q You went with your friend to enjoy the music just as the other people?

A Yes.

Q The conviviality of the place, these rock concerts was something special, a lot of fun?

A We didn't enjoy the group that much.

Q You had seen better ones; is that what you mean?

A Yes.

Q But that's what attracted you to the place in the beginning, they had been running a string of concerts during those years out there?

A I don't understand.

Q I'll go on to something else.

Cathy, do you recall where at the Coliseum, how did you get there that night? Did Charlie drive?

A Charlie Trace.

Q When he drove you, do you recall if he drove you through the driving area to the pick-up drop area?

A I think he did.

Q Did you enter through the pick-up --

Let me show you this photograph.

May I approach the witness, your Honor?

I want to ask you: Do you recognize the Coliseum in that picture there?

A Yes, the gates are over here (indicating).

Q That's the Hempstead Turnpike entrance; right? Then there is a pick-up drop-off area over there on the westerly end of the Coliseum where people could drive in, pick up people and drop them off?

A Right.

Q Did he take you to the drop-off end?

A I'm not sure.

Q Could you mark the pick-up drop-off area?

A I don't think I could.

Q But it's at the westerly side of the Coliseum?

A I would say it's on this side because we came out here.

Q You would say it's to the south side?

A Yes.

Q Would you say it's to the south side where Charlie was supposed to pick you up and drop you off?

A I'm not sure.

Q Were you shown this picture before you testified?

A No.

Q Could you tell me, could you tell this jury where the flower boxes are on this picture?

A I know they are there.

Q Could you try to locate the flower boxes for us?

MR. GARDNER: I don't think there is any foundation whether that was the photograph of the Coliseum.

THE COURT: Do you remember any flower boxes that night?

THE WITNESS: I do.

THE COURT: You don't see them on the picture?

THE WITNESS: Not the way it's presented here.

MR. GARDNER: I don't think he established any foundation when that picture was taken.

THE COURT: She said she remembers the flower boxes but the picture doesn't show it.

Q Could you point on the picture, but an F on the picture where the flower boxes were on that night?

THE COURT: If you can recall.

A The flower boxes, it's all around the Coliseum.

Q Now, are the flower boxes on the concrete sidewalk?

A Yes, we were walking on the sidewalk and they are to my right.

Q And that is where this instance with this young man took place; isn't it?

A Yes.

Q Isn't that true?

A Yes.

Q On the sidewalk where the flower boxes were in that area?

A Yes.

Q Now, you say he touched Joan first?

A Right.

Q And when he did that, did you make any observation of this young man as to his general appearance?

A Well, I didn't like the looks of him.

Q Tell us about that. He looked like what, spaced out?

A Yes, he looked like he was tripping.

Q You used the term tripping. Would you explain to us what you mean by tripping, Cathy? What do you mean by tripping?

A LSD trip.

Q What does that mean? Could you describe to this jury what a person on an LSD trip looks like?

A Wild, I guess.

Q You have seen that before?

A I'm familiar with it. In my school it's happened.

Q So would you tell us when you tell us tripping, what specifically you had observed about this young man that made you feel that he was tripping? Did you see anything about his eyes?

A Yes.

Q What did you see about his eyes?

A Just sort of --

Q Glassy?

A They weren't right.

Q He was wearing glasses, wasn't he?

A Yes, he was.

Q Did you observe anything else about him? Was he like hanging loose, lethargic? What was he like?

A He wasn't hanging loose, he was tight.

Q Shaky?

MR. GARDNER: She said tight.

A Right.

Q Now, Cathy, when he put his arms on Joan --

A One arm.

Q Which arm did he put on Joan?

A His right arm, I think -- no, it was his left arm.

It might have been both because I grabbed his right arm.

Q Did he let go when you grabbed his right arm?

A I guess it hurt.

Q You mean when you grabbed him you hurt him?

MR. GARDNER: That's the operation --

THE COURT: If I recall, you dug your nails into him.

THE WITNESS: Right.

Q And he let go?

A Of Joan; yes.

Q And Joan didn't complain to you of any bodily injury, did she?

A No.

Q Now, Cathy, would you tell us when he placed -- was it his hands that he placed on your buttocks?

A Yes.

Q If you can recall, which hand he placed on your buttocks?

A I would say it was the right one -- no, the left one.

Q And when he put his hands on your buttocks, you pushed him away; right? Right away?

A No.

MR. GARDNER: I think -- I don't think it's

necessary to constantly call the young lady dear.

THE COURT: Her name is Ms. Kragan unless you have been otherwise introduced to her.

MR. WEITZ: No, I haven't.

Q Ms. Kragan, did you push him away?

A Yes.

Q And you pushed him away immediately, didn't you, young lady?

A I would say that he put his hands on my buttocks and tried to put his hands around my waist. Then I pushed him away.

Q And you had no difficulty in pushing him away?

A No -- yes.

Q That's true, isn't it?

A Yes.

Q And you were done bodily injury by those two touches?

MR. GARDNER: Objection.

THE COURT: Sustained.

Q Did you suffer any physical injury by those two touches?

THE COURT: Sustained.

MR. WEITZ: May I approach the bench?

THE COURT: You may.

(Whereupon, a side bar conference was had.)

THE COURT: If this story is believed and this be the fact and whether physical injury was done it's not necessary or material.

MR. WEITZ: It may be a question of law, and I would like to explore it with this witness. That may be a question of law.

THE COURT: If you grab somebody by the buttocks it's a question whether a fifteen-year-old child, whether she's been assaulted or not.

MR. GARDNER: It's an unpermitted touching in addition to --

THE COURT: I don't think it's material. If you want to ask the question, I'll instruct the jury -- I'll let you do it. I'm going to so instruct them now.

MR. WEITZ: May I do this to preserve my record, ask that question out of the presence of the jury so there will be no possible prejudice to anybody.

THE COURT: I will just explain a touching of the nature as described here, if they find it to be true, constitutes an assault under the Penal Laws of the State of New York. If you wish to pursue whether she was subject to any physical injury under those circumstances, you may. That's the choice.

MR. WEITZ: I don't want to make a choice. I want to make a record.

THE COURT: It's immaterial.

MR. WEITZ: And for the purpose of this record can we assume that she did not suffer physical injury?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. WEITZ (Cont.):

Q Now, after you pushed him away you and Joan had left; true?

MR. GAMDNER: I'll object, if your Honor please.

Q Where did you go after you pushed him away?

A We started running through the parking lot and we seen a cop car, and we went over to tell him what happened.

Q You weren't looking for a police officer when you pushed him away?

A No, we weren't.

Q This was pretty much of an afterthought when you saw the police car, to tell the police officer; true?

A Right.

Q And your conversation with the police officer took place, Ms. Kragan, how long after you left the sidewalk where you had encountered this young man?

A Few minutes.

Q Few minutes?

A Maybe not even.

Q When you came to the Coliseum that night with Charlie, did he drive down Hempstead Turnpike?

A No.

Q Did he, via the Meadowbrook Parkway?

A Yes.

Q Then he crossed over the parkway?

A Yes.

Q And as is shown on this picture, came up this road over that bridge and down around to that entrance of the Coliseum to that point where there is a pick-up point?

A It may be. I haven't been there since then.

Q He came off of Meadowbrook, did he stay at the Coliseum or just dropped you off?

A He dropped us off.

Q And that was the place where you were supposed to meet him at the end of the evening; is that so?

A Yes.

Q Where he had dropped you off?

A Yes; where the poles are.

Q Well, there are poles all around.

A Well, on one side it was just faced in the one side that we walked in.

Q So as far as this photograph, which is in evidence now, Plaintiff's Exhibit 11 in evidence, you were unable to locate for us that portion of the sidewalk where you encountered this young man or the flower boxes or the poles; is that true?

A Yes. It might be down here. We came out in front of it, I think.

Q You don't know?

A No.

Q When you had your conversation with the police officer, were you instructed by him to follow him?

A No.

MR. WEITZ: I have no further questions.

MR. GARDNER: Nothing further, your Honor.

THE COURT: I have just one question.

Did you give a description to the police officer as you have given it to us here today of the incident?

THE WITNESS: I don't remember.

THE COURT: Did you tell him what happened?

THE WITNESS: We told him what happened.

THE COURT: Did you tell him that you had been --

THE WITNESS: Joanie used the word molested.

THE COURT: She used the word molested?

THE WITNESS: Right.

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THE COURT: All right, you may step down.

MR. WEITZ: I may have another question now due to the Court's questioning of this young lady.

Q By the way, have you discussed with Joan the events of that night?

A Yes.

MR. GARDNER: At what time?

MR. WEITZ: Since that night, up to today.

MR. GARDNER: Talk continually from that night.

MR. WEITZ: Oh, come on.

THE COURT: You have had one or more discussions with Miss Miller?

THE WITNESS: Yes.

BY MR. WEITZ:

Q How many discussions did you have with Miss Miller since that night?

A Well, I would say one when we called up the police station to tell them who we were and when we went to the Grand Jury and maybe once or twice since then. I haven't seen Joanie in quite a while.

MR. WEITZ: Your Honor, may we approach the bench?

(Whereupon, a sidebar conference was held.)

MR. WEITZ: Apparently, this young lady -- and I

have other reasons to believe that she testified before the Grand Jury. She used the term Grand Jury. I know your Honor ordered the defendant --

THE COURT: I have a copy of her Grand Jury testimony.

MR. WEITZ: If your Honor please, since she has said in answer to the Court's question and, of course, the Court would know -- I do not know -- that this girl Joan used the word "molested."

THE COURT: She did not so state in the Grand Jury, but she wasn't asked the type of question that I asked. I just finished reading it.

MR. WEITZ: Can we have a stipulation that she never testified at any time that Joan said to the cop that she was molested?

MR. GARDNER: I am not going to stipulate to that.

MR. WEITZ: Could I see the minutes to make my own judgment before the Grand Jury, whether the testimony is consistent or inconsistent?

THE COURT: I don't think it is inconsistent. That is what I'm saying to you.

MR. WEITZ: Well, at this time I'm making a particular request.

THE COURT: And I'm saying to you it is not

inconsistent. I have a more serious problem. These minutes, if I'm going to start to make them available to you, I have to make all of them available to you. She was asked a narrative type thing, she wasn't asked anything about what her conversation was with the officer. The only thing she said about her conversation with the officer was when she was asked about whether Haber was running or was he walking. Then she started out and gave a narrative which she didn't say anything about molested.

MR. WEITZ: But she did say what she told the police officer?

THE COURT: Yes.

MR. WEITZ: Can't we have an agreement that she gave no such thing to the Grand Jury.

THE COURT: I tell you, she wasn't asked the question. I just told you the question she was asked. It was not that kind of question. You could utilize it as you wish.

MR. WEITZ: May I see the minutes?

THE COURT: No.

MR. WEITZ: Can I take an exception to that? If your Honor pleases, may I ask the Court, are there other inconsistencies?

THE COURT: Not that I saw.

MR. GARDNER: As I recall, my understanding the issue in the Grand Jury minutes was whether or not anybody had refreshed her recollection prior to testifying.

MR. WEITZ: It is for the Court to decide.

THE COURT: She never testified yet that she used any of these minutes, and there is nothing inconsistent with her statement so far, so I am disinclined to violate the normal rule of the Grand Jury secrecy in a civil case; this is not a criminal case, and turn it over, the copies to you.

MR. WEITZ: I understand your Honor's ruling. I just want to preserve my record.

(Whereupon, side-bar conference was concluded.)

CROSS-EXAMINATION

BY MR. WEITZ (Cont.):

Q Miss Kragan, at any time prior to a few moments ago when you were questioned by the Court, did you anywhere say to anyone that you heard Joan tell the police officer that she was molested?

A It was on the front page of the paper. It said that one girl had said that they were molested.

Q And that's where you took the word from?

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A And then I said it to Joan, "Who said that?" And then she said, "I said it."

MR. WEITZ: If your Honor pleases, I am going to move to strike all of that. She is now quoting a newspaper story.

THE COURT: You asked if at any time.

MR. WEITZ: She ever said it.

THE WITNESS: I never said it.

THE COURT: Strike the rest of it out.

MR. WEITZ: Thank you.

Q Do you know where Joan resides?

A Kansas.

Q How do you know? What is the source of your knowledge?

A Her mother, she lives across the street from me.

Q Have you seen her over the last few years? Has she been in Kansas over the past few years?

A Last year.

Q Christmastime?

A No.

Q Did you speak to her last year about this case?

A I might have said to her --

THE COURTD The answer is just yes or no. Do you recall?

THE WITNESS: I didn't speak to her directly about the case.

MR. WEITZ: All right, thank you.

THE COURT: Thank you.

(Witness excused.)

MR. GARDNER: Your Honor wants to adjourn until tomorrow?

THE COURT: I see all the jurors nodding their heads. You are not holding me up.

MR. GARDNER: I think you'd better instruct the witnesses to come back tomorrow.

THE COURT: Mr. Keller, the jury has been here for such a substantial period of time -- I guess you have been, too -- probably playing darts in the other room.

Do you have a job?

MR. KELLER: Yes, part-time.

THE COURT: Would it be very much of an inconvenience to come back tomorrow morning?

MR. KELLER: I'll be in the City tomorrow morning.

THE COURT: Could you come here first?

MR. KELLER: It's going to be hard. I have some work to do there that I have neglected for a week.

THE COURT: My problem is I can't keep this jury

You have to come back. If you are having problems with your employer, just tell him the circumstances and tell him that I directed you to come back.

MR. GARDNER: If you came here at two o'clock, would that be helpful?

MR. KELLER: The part-time job isn't what's holding me up tomorrow. I work in the City. I work at ABC News.

THE COURT: I don't think you'll be long. You'll be out of here by eleven o'clock.

MR. GARDNER: Ten o'clock tomorrow?

THE COURT: Ten o'clock tomorrow morning.

MR. WEITZ: May I hand up a copy of the memo, it includes the very question that I discussed at side bar about the assault.

THE COURT: Well, you might have handed me that memo before.

MR. WEITZ: I just got it.

THE COURT: You ask me the law after the witness goes off the witness stand.

(Whereupon, the Court stood in recess for the day.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

HABER :

Plaintiff :

, against :

COUNTY OF NASSAU :

Defendant :

----------x

United States Courthouse
Brooklyn, New York

May 6, 1976
9:30 a.m.

B e f o r e:

HONORABLE THOMAS C. PLATT,

U. S. D. J.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Steven A Tessler

STEVE TESSLER
Acting Official Court Reporter

Official Court Reporter
U. S. District Court

721 667

Appearances:

HARVEY WEITZ, Esq.
Attorney for Plaintiff

JOHN GARDNER, Esq.
Attorney for Defendant

MR. GARDNER: We had a young gentleman on the stand yesterday, and he said he would return this morning at your Honor's direction. He hasn't appeared yet. There may be a traffic problem. I do have another witness, so rather than hold up the rest of the proceedings, I have another witness.

C H R I S T I N A M O O R E, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR, GARDNER:

Q Is that Mrs. Moore?

A Yes.

Q If you will, please, speak loudly enough so the woman on the end can hear you.

Now, on September 30, 1972, were you married or single?

A Single.

Q What was your name at that time, your maiden name?

A DeGregorio.

Q How old were you on that day?

A Nineteen.

Q Did you have occasion on the 30th of September, on the 29th of September, that would be the day before, 1972, did you have occasion to go to the Coliseum located in Nassau where a rock concert was being put on by some people?

A Yes.

Q Mrs. Moore, would you please, in your own words, your own pace, tell these ladies and gentlemen of the jury what you experienced, what you saw, what you heard, what you did on that evening.

A We got to the concert about 7:30.

Q You say "we." Whom are you making reference to?

A My girlfriend Jody and I got to the concert about 7:30. We went inside to watch. We stayed until about 11:00, when we decided we didn't like the concert any more.

Well, we had waited until about 11:00 o'clock for the Ten Years After to come on, which was the group we were waiting to see.

When they did finally come on, we didn't like them, so we decided to leave.

As we were leaving the door of the Coliseum there was a man trying to get in the door, and the guard at the door said, "I told you you can't come in here," and he

still tried to push his way in anyway. So the guard pushed him out, and the guy went outside and stood there, and when we got outside he was on the ground.

Q Who was on the ground?

A This man that was pushed out the door.

Q What did he look like? Was he tall? Facially?

A Tall, stocky, dark, thick hair.

Q A beard? Did he have a beard?

A I don't remember.

Q What was he doing on the ground?

A Looking at everyone on the ground.

THE COURT: Laying on his back?

THE WITNESS: On his stomach, I believe.

THE COURT: Looking at people from his stomach?

THE WITNESS: He had his head up, like this.

Then we proceeded to walk to the car through the parking lot. As we were walking to the car we had made a judgment on this boy. We thought he had been tripping.

Q You made that decision?

A Jody and I.

Q When you say "tripping," what do you mean by that?

A On some kind of acid or some kind of drug.

Q Was he rational or irrational?

A He wasn't a normal person.

Q So the jury can understand, in what way did you observe him to be other than normal, at least at that time?

A When the guard pushed him out the door, I expected him to go back at the guard, but he walked away in a daze, and laying on the ground, looking around at everybody, it didn't seem normal either.

So we walked to the car, and on the way to the car two girls ran past us, tall, thin girls, and they said, "Watch out for that guy."

Q Did you know these two girls?

A No.

Q Did you ever see any of them in the courtroom?

A Yesterday.

Q Do you know what her name was?

A Kathy Kregan.

Q Kathy Kregan, the girl you saw in the courtroom yesterday, that was the same girl of the two girls you saw on that evening that ran past you and said, "Girls, watch out for that guy"?

A Right.

Q Did Kathy Kregan say anything else?

A Nothing that I remember.

Q What else did you do?

A Actually, we didn't hear them; we were talking at the time, they were a ways ahead of us, and we just caught, "Watch out for that guy," and we turned around and saw this same boy on the ground from the Coliseum running towards the girls, which was in the same direction we were going.

I said, "Jody, let's get in the car fast and lock the doors."

Q By the way, were you with your parents that evening?

A No.

Q Did you notice whether or not there were many older people at the concert or whether it was primarily young people without parents?

A Young people without parents.

Q Were you frightened at that time?

MR. WEITZ: Objection, leading.

THE COURT: Sustained.

Q How did you feel?

MR. WEITZ: Objection.

THE COURT: I'll allow it.

THE WITNESS: When I saw him coming towards

us--

Q How did you feel?

A When?

Q At the time you heard these girls say this and the time you said, "Get in the car".

A I didn't worry. We just jumped in the car. I had no feelings about it or anything.

Then we continued our conversation. When we got in the car he stopped -- there was a car parked here and a car here, they were both facing -- he stopped at this car, the Coliseum was over here, sto he stopped at this car, and like we could see him looking for the girl, and he turned around and walked away.

We waited until he walked away and started the car and backed out to the right and proceeded to the left to pull out to the left, and we made a right at the end of that aisle and then then the first right we could make.

Jody was driving. She pulled up behind the police car that was stopped in that aisle.

Q When did you first see that police car?

A When we pulled in the aisle.

Q Was the dome light on at that time?

A No.

Q What did you do?

A Jody pulled up behind the police car and she said -- I said, "Jody," I said, "Jody, there is nobody in that car," and the door was open.

I said, "Go around him," so we proceeded to go around on the left-hand side, and just as we got parallel to the police car we saw that there was a policeman and a boy, same boy, in the middle of the road on the ground.

Q The same boy you had seen before?

A Yes. They weren't moving, they were just squatting.

Q Did you see whether or -- how they were squatting, whether one had the other one? Describe it as best you can recall.

A The boy was behind the policeman. The policeman was the first one we could see. The boy had his head on the policeman's shoulder, it looked like, and both their right arms were extended out like this. I don't know who had whose arm, but I couldn't see the other arm. It wasn't extended out or in the air.

Q What did you do?

A I said he looked scared, and I couldn't figure out if he was a policeman or not or what was going on.

So we decided he must be a policeman, he had a suit on, a policeman's suit.

Q Who looked scared?

A The policeman.

Q Did he have a badge?

A I didn't see the badge. It looked like his jacket was open, and all I could see was his white shirt.

Q What did you do?

A I rolled the window down and asked if anybody needed any help, and nobody answered, so I said it again, and the policeman said, "Get in my car and radio for help."

Q In what manner did the policeman say that?

A Very calmly. He seemed like he was trying to keep everything very calm. He was trying to speak in a low tone of voice and say things easy, so I did the same, because I had seen this boy before and I figured something happened between the cop and the boy.

Q When the cop was talking to you very slowly and calmly, what did he say to you and what did you do?

A He said get in his car and radio for help. So I opened the door of the car I was in and the policeman's door was opened already.

I got in the police car and as I was getting in I said, "You'll have to tell me what to do and what to say,

because I don't know what to do."

So he said, "O.K." He said, "Pick up the receiver of the set and put it out the window."

I said, "Is this what I am supposed to have?" and he said yes.

He told me how to use it, push the button in, whatever it was, he told me how to use it.

He told me to call for an emergency 14 to the south side of the Coliseum. He gave me the car number, but I don't remember right now. I remember it was on the dash of the car, so I knew what the car number was. I called that through on the radio and I heard them calling other cars to the scene.

I knew the cop was scared and I was scared and everybody was trying to be calm, so I was showing him with how many fingers, how many cars were being called and how many cars were responding.

So I was putting up my fingers and saying, "four, five, six cars," so maybe he would feel better, knowing help was on the way.

Then he asked me, he got up -- no, no. He asked me, he said there was a switch on the right side of the steering wheel, just below the steering wheel, a white button, and I should turn it on.

I couldn't find it. I searched for what seemed like hours for the button, and I couldn't find it. I didn't want to press anything because I didn't know what was going to happen.

Q You said the car was running, the engine was running?

A Yes, it was in "park." I was afraid that if I did anything wrong then maybe it would upset this boy, and I saw he was trying to keep him calm.

#7 Q When you say he was trying to keep calm, who are you making reference to?

A The policeman.

Q Was he talking to the boy?

A No, but when he was talking to me he was trying to be very calm, very relaxed.

I got out of the car and looked under the dashboard for the button. I got in and turned on the emergency flashers and said, "Is that what I'm supposed to do?"

He said no.

Q You mean what? Put the blinkers on instead of the dome light?

A Yes. I never found the dome light.

Q The police officer said that is not what he

wanted you to do. Then what happened?

A Then I was still in the car, he got up with the boy and they both walked over to the car. As they were coming over to the car, I am sure he couldn't hear me, and I was saying, "Don't come over here with him. Wait until I leave. I don't want to be near him," meaning the boy.

I am sure he didn't hear me. I was trying to talk low so the boy wouldn't hear me. I didn't want him to get upset.

When he did come over to the car he asked me for a piece of paper that was on the car seat. I went to give him that.

He took the receiver through the window, the door was still open and he was -- the policeman was standing closest to the door with his arm around the boy and the boy was facing away from the car.

So the policeman was closest to the window. He was calling like this.

As he was radioing I got away from the car and stood behind the policeman, not in front of the boy.

When he finished talking on the radio I said, "Can I leave now?" and with that the boy started screaming, "You can never leave the Nassau Coliseum," and started to get excited, and violent.

Q You asked the policeman if you could leave and the boy said what?

A "You can never leave the Nassau Coliseum."

Q Did he say it loud or--

A He screamed it twice or three times.

Q He screamed, "You can never leave the Coliseum, you can never leave the Coliseum," and then you say he got violent. What did you see?

A He lunged toward me, so I ran around the back of the police car and I stood there.

At this time he was struggling with the police officer.

Q When you say "struggling," what was he doing?

A I belive he had gotten in the car.

MR. WEITZ: If your Honor please, I object to "I believe." Either she knows or she saw.

THE COURT: Did you see this struggle?

THE WITNESS: Yes.

THE COURT: Overruled.

MR. WEITZ: May we see where she saw it?

Q What did you see?

A When I got to the back of the police car the boy had jumped in the car and the policeman was struggling with him, trying to get him out, not punching him or hitting

him, just trying to get him out.

I ran around the side of the car. I ran around the side of the car and then I heard the engine, either the key grinding the engine, because it was on already. I think it was the key grinding the engine.

Q What kind of sound was it? You said you heard a grinding sound?

A If the car is running and you turn the key on anyway, it's going to grind the engine.

Q The engine was grinding in some way?

A I can tell, because I have done it myself a couple of times.

Q Could you see inside the car at that time?

A No. Then I ran on the side of the police car and I heard the gas accelerate and I thought that he was going to pull away in the police car, so I stopped short. It was raining,and I fell next to the passenger door.

When I got up he was still in the police car, I could see in the window.

I saw the cop struggling to get him out. I then ran to Jody's car. She had pulled up in front of the police car at the end of the aisle.

I know the boy was still in the car when I ran. I was taking a chance because I thought--

MR. WEITZ: Objection, your Honor, "taking a chance."

THE COURT: I will let it stand.

THE WITNESS: It was-- I wanted to get out of there. I was afraid I would get run over in the process.

Q What gave you that concern that you might be run over in trying?

A Because the boy was accelerating the gas pedal and tried to turn the key on, thinking that the car was not on. It seemed he was trying to move the police car.

Q Where did you have to go to get in your girl-friend's car?

A I was on the side of the police car. I had to run in a straight line and jump in Jody's car.

Q Was she in front of the automobile where the accelerator was being pressed?

A Yes, but at the other end of the aisle.

I jumped in Jody's car, I said "That guy's crazy; let's get out of here."

Q What did you do?

A We turned right at the end of that aisle. When we got to the front of the Coliseum parking lot we made a right turn, and at that point police cars were coming

in to the Coliseum.

I yelled, "Hey."

One of them stopped.

I said, "I think a boy is tripping and giving the policeman a tough time."

What did you do then?

Q What did you do then?

A Left.

Q Sometime later did you learn some incident had happened at the Coliseum and later made contact with the police and told them what you recall?

A Yes.

Q And that is the extent of what you know?

A Yes.

MR. GARDNER: Nothing further.

CROSS EXAMINATION

BY MR. WEITZ:

Q Mrs. DiGregorio, were you here in court yesterday?

THE COURT: Her name is Mrs. Moore.

Q Mrs. Moore, your maiden name was DiGregorio?

A Yes.

Q As a matter of fact, at the time that this incident occurred you were how old?

A Nineteen.

Q And you were working as a legal secretary, weren't you?

A Yes.

Q Mrs. Moore, were you here in court yesterday?

A Yes.

Q And would you tell us how did you get to court yesterday?

A Mr. O'Callaghan picked me up at my house.

Q Is he one of the gentlemen associated with Mr. Gardner?

MR. GARDNER: I'll concede, your Honor.

MR. WEITZ: I don't need any concession, your Honor. Can I explore this myself?

THE COURT: His office drove her here.

MR. GARDNER: I'll concede we picked her up and drove her to court, and when court was over, we took her back. This morning we brought her in again.

Q When you were picked up yesterday and came to court, did you come here with anybody? Was there anybody else besides Mr. O'Callaghan in the car?

A They picked me up at work. Kathy Kregan was in the car.

Q Anybody else?

A No.

Q When you left court yesterday -- when Mr. O'Callaghan drove you to wherever it was you had to be dropped off, did you leave with Kathy Kregan?

A Yes.

Q With another witness in this case?

A Yes.

Q When you drove in yesterday, how long was that trip?

A About forty-five minutes.

Q When you left the court yesterday, how long were the three of you together with Mr. O'Callaghan?

A The other two witnesses?

Q Yes.

A One boy got dropped off in Queens -- about an hour -- and then an hour and a half.

Q During that period of time yesterday--

By the way, when you came in this morning was there anybody else who was a witness?

A No.

Q Both yesterday, driving in to the court, driving home from the court, did you discuss the events of that night with these other people?

A We spoke briefly. I asked Kathy if she was the girl that warned us that the boy was coming, and she said yes.

Q So actually you didn't remember this girl, you spoke to her and she told you that she was the girl that said something to you about "Watch out"?

A I didn't recognize her because I never saw her face.

Q Were there any other events that were refreshed to your mind by discussing this case with these other witnesses in a car coming to court and going home?

A No.

Q Mrs. Moore, you read some things that you had either written or a statement you had given or testimony you gave someplace before testifying, did you not?

A Yes.

Q That was to help you recollect the events of that evening?

A Yes.

Q Now, ma'am, we go back for a moment. You say you were with a friend?

A Jody Geller.

Q Is she presently in New York? Do you know where she is?

A In Missouri.

Q When you came to the Coliseum that night, you actually were inside and watched the performance of some sort up until a time you felt that the show wasn't too good, and then you left?

A Right.

Q You were going directly home? I presume you were going directly to your car?

A Right.

Q As you came out did you observe this young boy that you told us about on your direct testimony, in the doorway trying to get into the Coliseum? Did you observe him?

A Yes.

Q And then did you say a guard pushed him out of the doorway?

A Yes, after a couple of times telling him he couldn't come in and he still tried to get in.

MR. WEITZ: Can I have the original statement?

MR. GARDNER: I don't have it here.

Oh, here they are.

MR. WEITZ: If your Honor please, can we have this marked for identification?

THE CLERK: One statement marked for identi-

fication as Plaintiff's Exhibit 31.

(So marked)

Q If you have to look at this to refresh your recollection at any time when I ask you a question, feel free to do so.

MR. GARDNER: I'll object to that indication. This witness said she looked at something other than the one statement. If she needs anything, I think it's appropriate to give her anything.

MR. WEITZ: If she needs anything else, she'll ask.

Q Now, Mrs. Moore, when he was pushed away the first time, this young boy, how did he act? Did he act as if he understood what was going on?

A He acted as if he was in a daze.

Q When he was pushed away the second time?

A There was only one time. He was told twice not to come in and then when he tried again to get in he was pushed out.

Q I see. I misunderstood what you were saying. Was this at the-- Or could you tell me what entrance to the Coliseum it was at?

A I have no idea. I was only there once to the Coliseum. That was the only time I have ever been there.

It was the main entrance everybody was going into when I first arrived at the -- the only entrance people were going out of.

Q But that was at the - Maybe if I show you a photograph it could refresh your memory.

I ask you to look at this for a moment and I'll ask you a question.

Does it refresh your recollection as to what the Coliseum and the entrance areas looked like? Does it help you at all?

A Not really.

Q Doesn't. All right. If it doesn't fine, then we'll go on to something else.

Was this entrance that you spoke about, where the concrete roof is at the Coliseum, was there a concrete roof over the doorway? Is that the entrance you're talking about?

A I don't remember if there was. I know there was an escalator up to the door. We went up to the escalator and went out right at those doors. There was only one door you could get out of, and that was the door I was leaving.

Q Did you then walk out the door?

A Yes.

Q And did you walk out simultaneously with -- if you can remember -- before or after the event took place where this young boy was trying to get in and apparently didn't understand, was dazed?

MR. GARDNER: Objection to the form.

THE COURT: Sustained.

Q Did it take place before, after, or simultaneously with the time they pushed this young boy away?

A What took place? Did I walk out?

Q Yes.

A I was still in the Coliseum when he pushed him out.

Q Thereafter did you walk out?

A Yes.

Q How long after did you walk out?

A However long it takes to push somebody out of the way and me to walk out.

Q A matter of seconds?

A Yes.

Q Did you then walk directly to your car, or did you walk around the Coliseum, or spend some time there, or what?

A We walked straight out to look around to find the direction where the car was.

Q How long did that take?

A About a minute.

Q When you walked out did you walk out straight towards the parking lot?

A We walked out straight, and I believe the car was to the right.

Q Would you know if that is in the direction of Hempstead Turnpike or south?

A I think it's--

Q So you walked in that direction towards the south parking lot?

A I think so.

Q Were you walking-- Did you have to walk some distance from the doorway to the parking lot?

A Yes.

Q And as you walked that distance, south, you would say toward Hempstead Turnpike anyhow?

A Yes.

Q You walked towards Hempstead Turnpike, would you tell us during that period of time did you see the boy as you were walking and before you heard or saw two girls run past you?

A No. The last time I had seen him was when he was on the ground in front of the Coliseum. Then we left

to walk to our car, and I didn't see him again until the girls told us he was coming.

Q When you were walking on the grounds in front of the Coliseum, you say you saw the boy on the ground?

A Yes.

Q How far was he from the doors when you saw him on the ground?

A About five or seven feet. He wasn't too far from the doors.

Q Five or seven, you said?

A Yes, about that.

Q You say he was laying on the ground?

A Yes.

Q When the guard pushed him out, had he stumbled, this boy?

A I don't think so. I think he was on his feet when he got out and he lay down on the ground himself.

Q Mrs. Moore, I'm going to hand this up to you for a moment.

MR. WEITZ: May I direct the witness's attention to something, your Honor?

Q Can you take a look at this. Read it to yourself.

A (Witness peruses document.)

Q Have you read it?

A Yes.

Q Does that refresh your recollection as to whether or not the boy stumbled?

A No, I don't think he stumbled. I think he got down on the ground himself.

Q Did you ever say to anybody that he had stumbled?

A I may have four years ago.

MR. GARDNER: What page are you making reference to? I will ask Mr. Weitz what page.

MR. WEITZ: She says she doesn't remember saying anything like that. She says she may have.

Q Mrs. Moore, in any event, you saw him on the ground?

A Yes.

Q When he was on the ground I think you told us he was on his stomach?

A I think he was on his stomach as far as I remember.

Q In other words, with his stomach on the ground and his back--

A He definitely was on his stomach.

Q What was he doing?

A He had his head up and looking around at everybody. I don't know what he was looking at, but he had his head up.

Q Would you say he was just out of it?

A Yes.

Q You said you made a judgment that he had been tripping on acid or something. When you said "acid," did you mean LSD?

A I guess so. Anything. I guess whatever it is.

Q Had you ever seen people in your life, whether it was at the Coliseum or anywhere before this evening, who had been tripping?

A Not that I actually knew they definitely were, but I knew of the symptoms.

Q What symptoms did you know?

A Just out of it. Not knowing what they were doing. Not knowing a lot of things.

Q Uncoordinated, out of contact with reality?

A Yes.

Q As if on any kind of drug? You were working for a lawyer at that time?

A Yes.

Q Did he have a criminal practice? Did you ever

see people involved with drugs?

#9 A No.

Q Did you continue to watch him as he was on the ground in that state you just described?

A No, after we saw him we left.

Q Now, did you, as you walked towards Hempstead Turnpike did you get to your car?

A Yes.

Q And when you got into your car I think you told us that it was backed out, pulled around to the end of one aisle and back up another aisle; is that right?

A Yes.

Q How far you traveled, I am not concerned about that, but there came a time that you saw a police vehicle in an aisle as Jody was driving the car to leave? Correct?

A Yes.

Q And this vehicle that you saw when you saw it, was it facing the same direction as the vehicle you were in?

A Yes.

Q So were you seated in the right-hand seat of the passenger side?

A Yes.

Q So as you came behind it you were parallel with the right-hand side of the car?

A No, I don't think she pulled up exactly, directly back of it.

Q A little off to the left, all right, of the police car?

A To the left.

Q A little off to the left?

A Yes.

Q But at that point you didn't know whether the door was open or closed on the police car?

A She didn't pull all the way up to the car, and I could see that the door was open and she could see.

Q You suggested to her to pass around the car?

A Yes.

Q At that point you didn't see anybody in the roadway at that particular moment?

A No.

Q Did Jody start and try and pass the police vehicle?

A Yes.

Q As she pulled over to pass the police vehicle did she get up to the police vehicle?

A Just about parallel with it.

Q Parallel with it. O.K. When she got parallel, I mean alongside, when she got alongside the police vehicle, was it at that point, or was it thereafter that you observed something about the police officer and this young boy?

A Yes.

Jody had stopped because there was two men in the middle of the road and we couldn't pass.

Q Was that in the path of Jody's car?

A I don't think it was directly. She wouldn't have run right over them. But I don't think she could get around them either.

Q I am not sure I understand what you mean. Was it in front of Jody's car? Was it-- Was it forward?

A It was more in front of Jody's car than in front of the police car.

Q Was it also forward of the police car, or was it where the police car--

A Forward of the police car.

Q How much forward?

A Ten feet maybe.

Q So that you were actually very close?

A If ten feet is close, maybe it wasn't that close. Maybe it was fifteen feet. It was close enough to hear him, yes.

Q I'm asking where you were. You're anticipating me. When you would open your right-hand side door-- Was that a two-door or four-door car you were in?

A I think it was four-door.

Q You were in the front seat?

A Yes.

Q You would open your door. The police vehicle would be to your right?

A Correct.

Q Did you call out to the police officer before you got out of the car?

A Yes.

Q When you called out to him he responded to you, correct?

A Not the first time. The second time.

Q Will you tell us then if he was fifteen feet in front of the vehicle, the police vehicle, was the front of your car even with the front of the police vehicle or was it back from the front of the police vehicle?

In other words, when you said parallel, were you even or just alongside? You could be alongside and not even. Do you know what I mean?

A Right. I don't think we were forward of the police car. If anything we would be a foot further back

than the police car.

Q So you are saying that the police-- the entire length of the police vehicle plus another fifteen feet were ahead of you, correct?

A Yes.

Q Would you say the front end of your car to where you sat in the car--

A I don't understand.

Q Where you were seated, there was a space between you and the front bumper of the car?

A Yes.

Q Would you say automobiles are a good 18, 19 feet long?

A I guess.

Q So you had the distance 15 feet plus the distance of the police vehicle, 16 feet to 18 feet, plus that portion of the police vehicle that was in front of you about how far would you say, let's say, to where you sit to the front bumber of the car?

MR. GARDNER: I don't want to interrupt. I see no relevancy.

MR. WEITZ: I'll show you, Mr. Gardner.

THE COURT: I'll allow it, Mr. Gardner. About how far from where you were sitting in your

car to the place where these two men were, was it, approximately? How far in feet?

THE WITNESS: I could probably tell you better this way.

Q Why don't you do that?

A I would say about where you're standing.

MR. WEITZ: Can we have an estimation about how far that is?

THE COURT: The length of the jury box is 19 feet, and from where I sit here to the end of the jury box, about 26 feet, so I guess you're talking about 23 or 24 feet; 20 to 24 feet, somewhere in there.

Q You were able to talk to the police officer?

A Yes.

Q You did see-- I think you told us the position was that the young boy had his head on the police officer's shoulder, seemed to be resting his head on his shoulder?

A Yes.

Q He was docile, wasn't he, at that point?

A Yes.

Q And the police officer was not making any sudden movements or doing anything to aggravate the situation,

true?

A No.

Q And as far as you were concerned, you made your own judgment that the best thing to do under those circumstances was not to do anything to excite or aggravate the boy, true?

A Yes.

Q So you spoke softly, the police officer spoke softly, and you were able to communicate with one another without any problem?

A Yes.

Q He told you what to do?

A Yes.

Q You got out of your car, walked over to the police vehicle, and he instructed you in the use of the microphone?

A Yes.

Q By this time you were much closer to the police officer, weren't you, than you had been when you were in your car?

A Well, actually when I opened the door to get out of the car the police officer's door was right here, so I don't know if the front -- I was in was anything longer than the police officer's car. I am not sure whose

car was longer, but I know I was just about right next to the police officer's door. All I had to do was walk out and walk right into his door.

Q All right, good. So that your doors, at least, were near one another?

A Yes.

Q He told you what to do?

A Yes.

Q He was able to tell you and you used the microphone, true?

A Yes.

Q Now, there came a time when you transmitted this, what you call Emergency 14, or Signal 14, and told them to come to the south parking field of the Nassau Coliseum, true?

A Yes.

Q And that would be the area near the Hempstead Turnpike where you had parked the car?

A Yes.

Q And then you told him that there were -- you held up your fingers and you told him there were three, four, five or six cars coming, right?

A Yes.

Q And then he gave you instructions about how

to turn on the dome light so that his vehicle could be located better?

A Yes.

Q You couldn't find that button, so you put on the flashers?

A Right.

Q By that you mean the blinkers we have on our automobiles like the parking lights that blink in the front and the brake lights that blink in the back?

A Right.

Q And there was no problem as far as you were concerned in doing all this and the police officer didn't encounter any problems with this young man, this boy. Was their position the same while you were doing this? Still resting his head on his shoulder, the boy?

A Yes.

Q The police officer even asked you to write your name down?

A He did.

Q Did he?

A I don't think so.

Q You don't remember?

A I don't remember.

Q But there came a time that the police officer

for whatever reason, got up to his feet?

A Yes.

Q Then he came over to the car, or started to come over to the car with the young boy, right?

A Yes.

Q At that point you didn't want to be there, right?

A Right.

Q You asked him not to come over to the car?

A I was more or less talking to myself. I am sure he couldn't hear me.

Q So you were just talking aloud, or were you talking-- were you thinking to yourself?

A I was talking. I was in the police car. He was walking toward me. I didn't want to say it loud enough for the boy to hear me.

Q You decided to get out of that car and get in your car as best you could?

A Right.

Q Did Jody move her car during the sequence of these events?

A I didn't see her when she moved it, but after I got out of the car I noticed -- I wasn't aware when she was moving the car, but when I got out of the police car

and looked around after I was at the back of the police car, I could see Jody pulled in front.

Q Where had she pulled?

A In front of the police car.

Q You mean forward?

A Yes. To the end of the aisle.

Q She moved away from the car?

A Yes.

Q So she would have had to have driven past where the police officer and the boy were on the ground?

A Unless she backed up and went around. I have no idea how she did it. If you went forward, yes, fine. But if she didn't, if she went backward, she wouldn't have to pass them.

Q Actually, you have no recollection at all how Jody moved her car or--

MR. GARDNER: I object to the form of the question. She said she didn't see it so she can't testify. Recollection has nothing to do with it.

THE COURT: She said she didn't see it.

THE WITNESS: I never saw her move it. I have no idea how she moved it.

Q While you were there and talking to the police officer, were you looking forward at him?

A Yes.

Q And as you looked forward did you see the aisle, the aisle for the moving traffic?

A For the moving traffic?

Q The aisle between parking stalls.

A Yes.

Q You could see that aisle?

A Yes, there was a time I got out of the car and was looking underneath the dashboard for the white button. There was a long period of time I was looking at the dashboard for the white button, and there was a time I got out of the car and crouched under the dashboard to look for the button. If she moved it then--

Q You wouldn't have seen her?

A Right.

Q In that period of time when you were looking for the button and looking under the dashboard and got out of the car, how long was that? Fix some period of time.

A I'd say about two minutes maybe.

Q And that event took place after you had told Police Officer Sehlmeyer that three, four, five or six cars were coming?

A Yes.

THE COURT: Did you actually tell him that

or were you signaling that?

THE WITNESS: I was signaling it, and showing him. I said "five cars, six cars, or seven cars." I didn't just -- just said "cars."

THE COURT: You didn't say were on their way?

THE WITNESS: No.

Q When you let him know that, that is when he told you to put on the flashers, true?

A Yes.

Q During those couple of minutes, apparently as far as you are aware, Jody moved the car during those couple of minutes. You didn't see how she moved the car, correct?

THE COURT: She did not say that. She said she didn't know when Jody moved the car, because she didn't see it. Isn't that right, Mrs. Moore?

THE WITNESS: Yes.

MR. WEITZ: I'll try and take it slower.

THE COURT: Don't put something in her mouth that isn't there.

MR. WEITZ: Judge, please. May I ask this lady some questions.

Q When you were speaking with the police officer the car was there, true?

A When I first got in the police car.

Q And the first time that you became aware that the car, Jody's car, was not there was after you looked for the button to put on the dome light, true?

A No.

Q When did you first become aware that Jody's car was not there?

A When I was behind the police car looking for Jody's car.

Q Was that after you had gotten out of the car?

A Yes.

Q When you had gotten out of the car, was a police officer already there with the boy?

A Yes.

Q And was he at the door with the boy?

A Yes.

Q And did you actually hand him the microphone, the police officer?

A No, he took it out of my hand.

Q You had it in your hand. When you say "he," you mean the police officer, took the microphone out of your hand?

A Yes.

Q Were you in the car or out of the car when

he took the microphone out of your hand?

A In the car.

Q Was the boy with him?

A Yes.

Q Did you then get out of the car?

A Yes.

Q When you got out of the car was the police officer and the boy -- were they next to the door?

A Yes.

Q And was the door open?

A Yes.

Q And when you got out of the car was that boy getting off the street to your side, or turn, or what would you describe to us how you got out?

A I turned this way and the door was half open, I turned to the left.

Q Your left?

A Yes. And got out of the car that way and stood as if behind -- not behind the door, but back from the door, like at the second door, if there was a second door.

Q You got out of the car -- Would it be correct to say that you turned your body around, put your feet, so you had your back, as you were getting out of the car, your

back was to the car and you were going sideways?

A I don't remember.

Q But then you moved in the direction of the back door?

A Between the two doors.

Q Did you remain standing there or walk away?

A I remained standing there.

Q For how long?

A Until the police officer finished talking on the radio.

Q And then is it at that point when you asked him, "Can I leave?"

A Yes.

Q About how long after you got out of the car was that in time, approximately?

A It didn't take too long, about a half a minute maybe.

Q That is when this boy then shouted, "You can never leave the Coliseum; you can never leave the Coliseum"?

A Yes.

Q Then you ran off?

A Yes.

Q And you ran off towards the rear of the car?

A Yes.

Q Were you looking back as you ran off?

A No.

Q And you were looking for Jody's car?

A When I got to the back of the car, then I looked for Jody's car.

Q You were looking then in-- northward, or the opposite direction you had been going; correct?

A Yes. No, no. Which is north? I am not sure.

Q Forgetting about direction, as you looked in that direction you didn't see Jody's car?

A Yes. I saw it ahead of us. When I got to the back, the right back end of the police car, I saw Jody's car in front of us.

Q So did you run up to her car?

A I started to, but I heard the engine, the accelerator accelerate, and I stopped short because I thought the car was going to take off,and I didn't want to get hit.

Q Did the car take off?

A No, it was in "park."

Q I'm sorry?

A It was in "park."

Q Did you see it in "park"?

A No, but I know it was in "park," the engine

was running d it wasn't moving.

Q It could have been in "neutral" also, but as far as you knew, it didn't move?

A Right.

Q Did you then proceed to Jody's car?

A I fell when I had stopped, and I got up and I was right at the passenger's side door, the front passenger's side door of the police car. I could see in the window and I could see the policeman struggling, because I wasn't going to run if I didn't know what was going on.

The boy was still in the car and they were struggling, and then I ran.

Q Are you saying that you stopped to watch the police officer struggling with the boy?

A No, to see what was going on, to see if it was safe for me to run.

Q How long was it that you made some observation that you could run?

A Fast. I got up, saw them, and decided to run.

Q Fractions of a second?

A No, a second.

Q And in that second-- Did you see where the police officers hands were?

A I believe that they were on his arms, on the boy's arms.

Q Did it appear to you that he was trying to pull the boy out of the car?

A Yes.

Q When you made that observation, is that when you ran off to Jody's?

A Yes.

Q Did you get to Jody's car?

A Yes.

Q How far did you have to run?

A I'd say to maybe half of the benches.

Q Halfway back in this courtroom, is that it?

A Maybe to the second or third row.

Q I am standing here. Is this what you consider the first row?

A That is the first row, right.

Q This row here?

A Yes.

Q That is about the distance you had to run?

A Yes.

Q Did you get right in the car?

A Yes.

Q Go right away?

A Yes.

Q While you were running that distance did you

hear anything?

A No.

Q While you were running that distance did you see anything by way of flashing lights of the police vehicles or anything like that?

A No.

Q Did you see some police vehicles as you left the Coliseum?

A Yes.

Q Where was it that you saw those police vehicles?

A When we turned right at the end of the aisle we were in -- we went down to the first aisle of cars, made a right, and the entrance was right there. The police car started coming in that entrance and didn't seem to me -- they were looking around, they were still moving.

Q Did you stop to look -- talk to them?

A Yes.

Q Did you tell them where to go?

A Yes.

Q Was that in a minute or so from the time you left the aisle, got in your car, and drove away?

A Yes.

MR. WEITZ: I think I am almost finished.

your Honor.

I don't have anything else.

MR. GARDNER: Nothing further, your Honor.

THE COURT: All right, thank you, Mrs. Moore. You may step down.

(Continued on the next page)

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(Outside the hearing of the jury.)

MR. GARDNER: Does your Honor want me to make an offer of proof, is that the purpose of this?

THE COURT: Yes.

MR. GARDNER: My intent to this witness to identify certain records that were produced pursuant to subpoenas concerning records of George Haber, one at the age of 14, one at the age of 15. That these records are kept in normal course of business so that both of those records of arrest of George Haber indicated that he was drinking as a minor and public intoxication.

In that as part of the procedure at the Police Department, Spring Valley is that a child of that age, 14 and 15, and particularly George Haber, that those two ages relationship to those two arrests was in fact released to the custody of his mother, Mrs. Pearl Haber, and that Mrs. Pearl Haber pursuant to the procedures at the department, signed a statement accepting the release of her son in her custody. The sole purpose --

MR. WEITZ: Can we have those particular papers marked for identification?

THE COURT: Marked for identification.

THE LAW CLERK: Two records marked for identification as defendant's Exhibit G and H.

MR. GARDNER: The sole purpose of that testimony, if your Honor please, is twofold.

Firstly, it's my position that the defendant -- that Mrs. Haber who would be next-of-kin in the event any recovery would be entitled to a share in any recovery under wrongful death, assuming one is given by this jury and as subsequence thereof she is an interested party although the suit is out of necessity brought in the name of the administrator in his representative capacity, namely representing those parties that would inherit, one of those is Mrs. Haber who testified on the stand that she did not know, and had not heard that her son was arrested at the age of 14 for public intoxication. That she did not know and had not known he was arrested at 15, where the documentary evidence was that she did know and had heard, and that she signed for the release of her son to her own custody.

The second part of the offer of proof is limited to an offer of credibility. Since Mrs. Haber has placed the character of her son in issue, by attempting to influence this jury that he was a good character and background, and that he -- there was an agreement to support -- twenty-five percent of his earnings, in an attempt to project that support under the inference

this his good character and standing would permit him to proceed in making this kind of contribution.

So, I submit it's on issue of credibility, it's on the issue of his character and capacity to in fact continue making payments to the family in view of the background.

Lastly, if your Honor please, there is also an additional arrest report which was, one, for the possession of marijuana which I'll have marked now.

THE LAW CLERK: One report marked for identification, as defendant's Exhibit 5.

THE COURT: On the latter?

MR. GARDNER: Which one your Honor?

THE COURT: On the second half of the thing, whether you can introduce proof of specific instances of character under 405B in cases in which traits of character of a person is an essential element in a charge claim, or defense. Is it your position in a wrongful death action it's an essential element of the claim?

It may be part of the -- It's not an essential element of the claim.

MR. GARDNER: His character, at the time I think it's an essential part of the claim.

THE COURT: It's part of the proof of damages,

but not an essential part of the claim. It's part of the proof, but not what I would say is an essential part of the claim as such.

MR. GARDNER: I don't think one for damages and one for the underlying facts --

THE COURT: I don't know, it's in sort of a backhanded way. It's ask me a question --

MR. GARDNER: The claim as I perceive it, he was not responsible for the ultimate occurrence and that it was entirely the fault -- I thin

THE COURT: I think it can come in on the question of credibility, as I indicated to you.

I think I have trouble with the fact that it can come in with 405B. I also thought 405B was limited to the type of specific type of case. Wrongful death not being necessary, although I don't know.

MR. GARDNER: I'd be willing, if your Honor pleases, to even limit the offer then on the offer of credibility if your Honor has some concern on the other.

MR. WEITZ: If your Honor pleases, I would respectfully point out to this Court, these records and this is one of the things that causes me such anguish in this case.

These records which under the Family Court Act

Section 783 and 784, the Family Court Act under which these records were maintained are confidential records. They're not to be disclosed to anyone. They found their way into the files of the Nassau County Police Department. There has been a clear violation of these provisions by the local police officers. I don't say this gentleman was one that violated the rule by turning these records over to anyone. However, the provision of 784 and 783 of the Family Court Act is quite explicit, they're not to be used, they're confidential records and --

THE COURT: But the purpose of the confidentiality, Mr. Weitz, is for the protection of the infant. The infant is no longer here to be protected, the purpose for which they are now being used is for the purpose of the credibility of an adult who was not -- the statute was not designed to protect, as I understand it.

That is Mr. Gardner's point. The purpose of the Family Court Act, and the secrecy provision, correct me if I am wrong, was that if a person such as you or I were convicted at the age of 14, the records would be sealed and nobody would use them against us during the course of our lifetime.

But, that doesn't mean they're sealed for the

rest of the world, for other purposes; does it?

MR. WEITZ: I think under the circumstance of this case the purpose for which it's being used is with respect to it as Mr. Gardner says, the character of the deceased, may I just point this out, your Honor.

By allowing these to be used in any way at this time the Court will be sanctioning a violation of those sections.

THE COURT: No.

MR. WEITZ: That is the way I feel about it.

THE COURT: But, the sections were designed to protect the minor for the balance of his life. We're not concerned with that question in this case. We're concerned here with the question of credibility. The credibility of an adult who has no relationship for the purpose of which those records are --

MR. WEITZ: Judge, may I point this out.

We have two sets, as I understand by Mrs. Haber, nothing more. The Court can look at them. Then we have attached to those receipts, those receipts are attached to juvenile records. The receipts themselves don't say anything about any crime. I am going to hand them up to the Court, but I want to finish my argument, to start discussing the details of these alleged offenses, is going to become a collateral issue, far

beyond what were involved in this case.

THE COURT: We're not going to go into details. They're going to be offered for the sole purpose of taking the credibility of a principal witness in this case and is it.

MR. GARDNER: That is it your Honor.

MR. WEITZ: All it says is I agree to present my son before the Family Court of Rockland County at a time specified.

THE COURT: You can ask me to close my eyes to all sorts of things, but where a person is released in somebody's custody they know why. We don't live in a vacuum.

MR. WEITZ: Sometimes parents do your Honor.

THE COURT: No, not at this stage. I mean really, we go pretty far when we're trying to do things, but you can't. Things don't happen that way.

MR. WEITZ: I would have to be a babe in the woods not to understand that the whole purpose of this is to say that this was a drunken sout who the world would be better off without.

MR. GARDNER: That is not true, your Honor. I'll tell you why.

MR. WEITZ: I think he protests too much.

MR. GARDNER: I do think you do. If your

Honor pleases, there is another record in there an arrest for the age of 14 for public intoxication. I am not offering that because there is not attached to that, one, a release.

MR. WEITZ: That is a magnanimous offer, your Honor, since an arrest would be of no relevance and that is what we're dealing with here. The arrest itself is of no relevance.

May I point out to the Court, we had two prospective jurors that the Court had to excuse in this case, both of whom were arrested and tried for assault on police officers.

THE COURT: We're not concerned with this, I'll so instruct the jury. These records and any testimony taken in connection therewith, which I assume we'll keep to a minimum would be solely for the purpose of the defendant's offering it solely for the purpose of taking the credibility of a prior witness appeared. I wouldn't even identify the witness at this stage, and they can take it or leave it as to whether or not it's a -- they're not to consider it in any other context.

MR. WEITZ: That is making a superhuman burden on six citizens.

THE COURT: Superhuman burdens are placed on

juries, I have to rewrite the rules, I would never do, but that is not my coaching. It's Congress in effect, you served that motion recently and I don't think that a proper way to do it.

I think we're better off under the common law, but be that as it may, we're stuck with these rules.

MR. WEITZ: May I suggest to the Court that the prejudice of this material far outweighs its probative value on the question of credibility of this mother, whose credibility to begin with is in doubt since she is the mother of the deceased and there is no question that that is a charge that your Honor has to give.

THE COURT: She gave statements up here. You may have been better off had you not put her on, but you put her on and a claim on the story that she is entitled to twenty-five percent for everything this man was to make for the rest of his life and all this, he has to take it.

MR. WEITZ: I didn't say that, your Honor.

THE COURT: She said --

MR. WEITZ: She said we had an agreement as long as he was working that he would give me twenty-five percent of whatever he brought in.

THE COURT: It's a lifetime agreement.

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MR. WEITZ: I didn't take it to be that. I think it was kind of clear she was talking about the period of time this man lived at home.

MR. GARDNER: You can put it in your summation.

THE COURT: I don't think you have any such plan in mind. I'm afraid you're talking with this situation, I'll let Mr. Gardner ask out of the presence of the jury the question he intends to ask of this witness and it will be clear, if he doesn't go further then what is admissible I'll let you cross-examine the witness, if you wish and then we'll call the jury back.

MR. WEITZ: Can I do that without waiving any rights, your Honor?

MR. GARDNER: Without putting in the exact language?

THE COURT: Ask him in question now, and we'll get his answer and he'll cross-examine and then we'll bring him back. They don't have to be precisely verbatim.

MR. GARDNER: I'll tell you what; I'll ask him.

DIRECT EXAMINATION

BY MR. GARDNER:

(Outside the presence of the jury.)

Q Name the relationship with the Police Department,

Spring Valley, I believe, are you not?

A Yes.

Q Certain records that were produced pursuant to a subpoena to my office?

A Yes.

Q I'll ask him to identify two records and have them marked, and I'll ask him if a -- by the way, how long have you been employed by the police department?

A Thirteen years.

MR. GARDNER: I'll ask him whether or not there came a time on February 27, 1970, when George Haber of 17 Samuel Road, Spring Valley, New York, I don't know what language your Honor wants me to use, he was picked up under a charge of public intoxication and what the process was with the police department with reference to an infant of that age, and whether or not George Haber was released to the custody of his mother, and whether or not she signed a receipt, and I'll have it identified and put it in.

MR. WEITZ: I am going to object to that. Can I have voir dire?

MR. GARDNER: I'll ask him if he personally released George Haber to his mother. And have the officer answer to that.

THE COURT: Did you, Mr. Gibson?

THE WITNESS: Yes, sir, that is my handwriting.

MR. GARDNER: Your handwriting?

THE WITNESS: Yes, sir.

MR. WEITZ: May I ask a question?

THE COURT: Yes.

MR. WEITZ: Mr. Gibson, was it Detective Gibson?

THE WITNESS: Yes, sir.

MR. WEITZ: What is your job with the Family Court?

THE WITNESS: In 1968, sir, I was assigned by my department as a juvenile officer.

MR. WEITZ: What?

THE WITNESS: Juvenile officer.

MR. WEITZ: Did you witness any of the alleged violations mentioned in those two slips that you have, those two documents?

THE WITNESS: Yes, sir. The defendant was arrested by uniform patrol, brought into the police station and turned over to me.

MR. WEITZ: He was turned over to you at a police station?

MR. GARDNER: If I may interrupt, if Mr. Weitz asks this officer whether or not he saw the arrest, he is opening the door and I'll pursue it.

THE COURT: This is a voir dire, he wouldn't do this in front of a jury. He is smarter than that.

G E O R G E G I B S O N, having first been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

THE CLERK: State your name for the record.

THE WITNESS: My name is George Gibson.

G-i-b-s-o-n.

DIRECT EXAMINATION

BY MR. GARDNER:

Q By whom are you employed?

A I am employed by the Village of Spring Valley.

Q In what capacity?

A I am a detective on the police force.

MR. WEITZ: I have a motion to make.

(Whereupon, a sidebar conference was held.)

MR. WEITZ: May I ask a question?

THE COURT: Yes.

VOIR-DIRE EXAMINATION

BY MR. WEITZ:

Q Mr. Gibson, was it Detective Gibson?

A Yes, sir.

Q What is your job with the Family Court?

A In 1968, sir, I was assigned by my department as a Juvenile Officer.

Q What?

A Juvenile Officer.

Q Did you witness any of the alleged violations mentioned in those two slips that you have; those two documents?

A Yes, sir. The defendant was arrested by Uniform Patrolman, brought in to the police station, and turned over to me.

Q He was turned over to you at a police station?

MR. GARDNER: If I may interrupt. If Mr. Weitz asks this officer whether or not he saw the arrest, he's opening the door and I will pursue it.

THE COURT: This is a voir-dire. He won't do this in front of a jury. He's smarter than that.

MR. WEITZ: Sir, this incident referred to in Defendant's Exhibit H for identification, can I know when that took place; is that it here, 32770?

THE WITNESS: Yes, sir.

Q And in the course of your duties, when a child of fifteen years of age is brought in to the police station, do you then question him; or what do you do?

A I immediately notify the mother or father.

Q Do you recall whether he was brought in alone or with other people?

A This particular incident he was brought in

alone, sir.

Q Did you call the mother?

THE COURT: Brought him what?

THE WITNESS: Alone, sir. I called the mother.

Q Was that within a short time after he was brought in?

A Immediately.

Q Is this when he was brought in, 18:14 hours?

A Yes, sir.

Q Did the mother come down to the station?

A Yes, sir.

Q How long did it take her to come down?

A I don't recall, sir. I know it was a short time afterward.

Q When she came down, where was George? Do you recall?

A He was in my office with me.

Q Was in handcuffs or anything?

A No, sir.

Q Was he seated in a chair, or standing, or what?

A Seated.

Q Was the officer who brought him into the station there?

A No, sir.

Q And did you have a conversation with Mrs. Haber?

A Yes, sir.

Q What did you say to Mrs. Haber?

A I had advised Mrs. Haber the reason her son was brought in to the police station.

THE COURT: I didn't hear.

THE WITNESS: I advised Mrs. Haber the reason her son was brought in to the police station.

THE COURT: Which was?

THE WITNESS: He was in a bus terminal which is right across the street from the police station and he was creating a disturbance. At that time he was brought over to the station by a uniformed officer, and I was advised why he was brought in and I talked to Mrs. Haber about this, and she said that she would talk to her son and see if she could straighten things out with him. She said he was involved in things like that because of the group of kids he was hanging around with at that time.

MR. GARDNER: If your Honor please, this is an attempt to get an examination without having examined the witness before.

THE COURT: I am going to allow him to do it

7 Voir-dire

because I haven't seen it do any harm. If he remembers even the conversation of Mrs. Haber, I think it makes it worth. She said, the result she excused her actions on the grounds it was bad company, is that it?

A Yes.

Q Was there any trial of any sort?

A No, sir. At that time, '69, '70, '71, we only had one family court judge in Rockland County, and he had a caseload of cases, and I referred this to Probation Department. What actually was taken from them, I don't know, I was never informed.

Q Let me ask you about this incident when he was fourteen years of age in 1969. Were you present when he was brought in to the station house?

A Yes, sir.

Q That was the year before, approximately the one I asked you about just now?

A Yes.

Q Was there any -- when you called Mrs. Haber, was the officer who made the arrest, was he present?

A No, sir.

Q Did you have the conversation with Mrs. Haber as to that incident?

A Yes, sir.

Q What did you say to her?

A I believe this is the one you're referring to, about him being intoxicated.

Q Do you have any recollection without the record?

A No, sir.

Q Then let me give you the record, and ask you to look at the record and ask you if it refreshes your recollection as to what you said to her.

THE COURT: Carry on this conversation -- I have to go on with the jury.

MR. WEITZ: I am sorry, your Honor. I have a father in the back of the courtroom.

Q Did you have a conversation?

A Yes, sir. I tried to have a conversation with him in front of his mother.

Q With him or with her?

A With both.

Q What was the conversation with Mrs. Haber?

A I asked Mrs. Haber was she aware that her son was beginning to get involved with a drinking problem.

Q When you say beginning to get involved, what did she say to that?

A She said she had no idea that he was drinking,

because if he wanted to drink he could do it at home.

Q Did you release George into his mother's custody?

A Yes, sir.

Q Was there a trial held?

A A petition was signed and sent to the Probation Department, Rockland County. This petition from there -- I have no knowledge of the disposition or I couldn't get any disposition on that particular case.

Q Did you attempt to get a disposition?

A Yes.

Q When did you attempt to get a disposition?

A The day after I received the subpoena.

Q And did you inform the defendant from whom you were subpoenaed that you couldn't get a disposition on that?

A He was informed that some of the records, that we coudn't get a disposition on --

Q Was that Mr. O'Callahan you spoke to?

A Yes, sir.

Q Now, Officer, are you still with the Juvenile Bureau?

A No, sir.

Q Officer, are the -- are you familiar with the provisions of the Family Court Act to these records?

MR. GARDNER: I don't think that has any materiality.

THE WITNESS: Yes.

MR. WEITZ: To the witness on his credibility.

THE COURT: Was he familiar with the provisions of the Family Court concerning the confidentiality of his records?

THE WITNESS: Yes, sir.

Q Did you release these records to the County of Nassau, Nassau Police Department, following the events of September 29, 1972?

A No, sir.

Q Did you discuss the contents of these records with anyone before coming to court here today?

A Yes, sir.

Q How often, and on how many occasions?

A Once.

Q When was that?

A I believe Thursday of last week.

Q Do you know how photo copies of these juvenile records came to be in the possession of the defendant's lawyers in this case?

A No, sir.

Q Would that be a violation of the Family Court

Act for you or anyone to release these records?

THE COURT: It doesn't make any difference.

MR. GARDNER: I don't see the purpose of this, your Honor.

MR. WEITZ: I want to show bias, hostility, your Honor, prejudice, bias and --

THE WITNESS: It would be a violation for me to release those records. Departmental violation.

Q Do you know who released those records, sir?

A No, sir.

MR. WEITZ: I'm saying to the Court at this point. I am leaving aside the merits and I think the conversation -- now knows the knowledge of this woman was very slight at best.

THE COURT: I can't buy that.

MR. WEITZ: Judge, I think to permit these records to go in at this point would be sanctioned violation of law, violation of -- departmental violation. I think we're promoting the breach of the confidentiality of these records, to allow them to go in. We're awarding defense counsel for the violation, wherever that came from, with the provision of departmental and the Family Court Act.

I don't think it should be sanctioned by this

Court, especially with the very slight weight of this material on the question of materiality, Judge.

THE COURT: I wish you'd address yourself to questions. I told you that I don't see the Family Law provisions designed to protect this situation. You can take any law and apply to a situation it's not designed to protect. The Family Law provision, providing for the secrecy of these records, is designed to protect George Haber during his lifetime, not to somebody to take the witness stand and not tell the truth, let us put it that way.

DIRECT EXAMINATION

BY MR. GARDNER:

Q Can I have your name again, please?

A My name is George Gibson.

Q And you were employed by whom?

A I am employed by the Village of Valley Stream, Spring Valley, New York, Rockland County.

Q In what capacity, sir?

A Police Officer, sir.

Q What rank do you hold now, sir?

A Detective.

Q Detective Gibson, going back to 1969. Were you employed at that time by the Police Department of Spring

Valley, New York?

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A Yes, sir.

Q In what capacity at that time?

A Juvenile Officer.

Q In response to a subpoena that was issued by my office, were certain records produced?

A Yes, sir.

Q I'm going to show one record which is composite of a card and attached piece of paper which is marked Defendant's Exhibit NO. G. I want you to look at that. Do you recognize that as being a record kept in the normal course of the business of the Police Department of Spring Valley?

A Yes, sir.

Q And Officer, let me ask you this. On the 28th day of February, 1969, was one George Haber of 12 Samuel Road, Spring Valley, whose father's name was Max Haber, brought in to the Police Department of Spring Valley under a charge of having --

MR. WEITZ: Objection. What he was brought in under.

THE COURT: That's one of the questions, Mr. Weitz, unfortunately.

Do you want to have this marked in evidence before he goes any further? I'll sustain it on that

ground.

MR. WEITZ: No, sir. That's not the grounds of my objection.

THE COURT: Is C offered; you better, you are testifying.

MR. GARDNER: I apologize. It's an oversight. I offer it in evidence, if your Honor please.

MR. WEITZ: I'm going to object to it.

THE COURT: I'm going to overrule your objection.

For the limited purpose for which I told the jury it was to be received, now, as far as the record itself is concerned, it's a record kept in the ordinary course of business. Is that correct?

THE WITNESS Yes, sir.

THE COURT: By the Police Department?

THE WITNESS: Yes, sir.

MR. GARDNER: If the record is not clear, I will make it clear. My purpose in offering this, inquiring this witness, is not whether or not the charges that were made were valid or not, but merely to take the credibility and truthfulness of one witness, that is all.

MR. WEITZ: If your Honor pleases, I take

objection to that. It's self-serving and does not affix his claim.

THE COURT: Like you, it's now his case. He wants to testify also. As long as you object on the grounds he's testifying, I will sustain.

MR. WEITZ: I object on the grounds that Mr. Gardner is testifying.

THE COURT: I rebuked him. I will rebuke him again.

THE CLERK: Defendant's G in evidence.

Q Now, on the 28th of February 1969, was George Haber --

THE COURT: Ask him what happened on the 28th of Feburary, don't you testify.

Q On the 28th of February 1969, were you on as Juvenile Officer?

A Yes, sir.

Q Would you please tell us what happened, if anything, with reference to George Haber?

MR. WEITZ: Objection to anything to George Haber, Judge, I have no objection, I thought the testimony was going to be limited to the mother.

(Continued next page)

THE COURT: All right. Confine your testimony as to what happened with Mrs. Haber.

Q Did you see Mrs. Haber that day; under what circumstances, what did she say to you and what did you say to her; tell us what happened?

A Approximately 9:45, between 9:45 and 10:00 p.m., Mrs. Haber was called to report to the Spring Valley Police Station to pick up her son George.

THE COURT: What did you tell her in that telephone call?

THE WITNESS: I told her her son was picked up by Officer Wetterwax.

THE COURT: Did you tell her what for?

THE WITNESS: Yes, sir.

THE COURT: Tell us what you told her.

THE WITNESS: I told her her son was picked up because he was drinking and because of his age, this is the reason he was brought in to the station.

She immediately came down to the station, signed the Family Court waiver.

Q When you say signed a Family Court waiver, she signed part of the document marked G, the second part attached to it.

A Yes, sir.

Q Would you explain to the jury what it is that Mrs. Haber signed when she came down, had this conversation in which you advised her that she had been drinking?

A Yes, sir.

Q This is a standard form on the back of this card, which -- our department, whenever a juvenile is picked up, his parents are called to the police station. They have to sign this form advising us that if they're called to Family Court because of the nature of this, would they produce their son or daughter or what-have-you, into Family Court. That is what this is.

Q That second part attached sheet, you say the parent signed, is all that in your handwriting?

A All of it except the signature on the lower right-hand corner.

Q Whose signature is it?

A Mrs. Haber.

Q Did you see her sign it?

A Yes, sir.

Q I'm going to show you another document marked as Defendant's Exhibit H. Do you recognize that as a record kept in the normal course of business of the Police Department of Spring Valley?

A Yes, sir.

MR. WEITZ: Objection.

THE COURT: Accepted.

THE CLERK: Defendant's Exhibit H in evidence, as indicated.

THE COURT: For the specific purpose, ladies and gentlemen.

Q On the 27th of Feburary 1970, were you a Juvenile Officer in Spring Valley?

A Yes, sir.

Q On duty that day?

A Yes, sir.

Q Did you have occasion to see Mrs. Haber on that day?

A Yes, sir.

Q Will you please tell the members of the jury and this Court how you got to meet Mrs. Haber; what circumstances, what you did, what she did, what you said to her, what she said to you?

A At 6:14 p.m., 26th day of February 1970, Officer Christoficin --

MR. WEITZ: Objection.

THE COURT: That is not answering the question. What did you say? Did you call Mrs. Haber?

THE WITNESS: Yes, sir.

THE COURT: Tell us what you did when you called her, what she said to her, what you said to her.

THE WITNESS: I called Mrs. Haber, I told her that her son was picked up by the Spring Valley Police Department for public intoxication and would she come to the station for her son.

Q Then what occurred? Did she come down?

A She immediately came to the Spring Valley Police Station and, again, this is the Family Release Form, only juvenile, I filled it out myself, and Mrs. Haber signed for her son. He was released.

MR. GARDNER: Nothing further.

CROSS-EXAMINATION

BY MR. WEITZ:

Q Do you know the disposition of that charge?

A No, sir.

Q Do you know the disposition of the prior charge?

A No, sir.

Q Officer, those are confidential records, are they not?

A Yes, sir.

Q You know how they came into the possession of the defendant in this case?

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MR. GARDNER: I think that is a question of law to advise a jury about.

THE COURT: Sustained.

Q Did you tell us earlier today it would have been a violation of departmental regulations for anybody to release these documents?

MR. GARDNER: Objection.

THE COURT: Sustained. You did it once, you shouldn't have done it. We crossed this bridge, and I'll tell the jury. I have full knowledge of all that went on, and I have made a ruling on the question of law of what you're hearing before you. It has nothing to do with the Officer.

MR. WEITZ: Can I go on to the next one, Judge?

THE COURT: Yes.

MR. WEITZ: Will the Court tell the jury that this was asked earlier today; I am not asking these things in a vacuum.

THE COURT: Go ahead.

Q Now, Officer, earlier today I asked you about that incident of 1969 out of the presence of the jury. Remember?

A Yes, sir.

Q And I asked you what did Mr. Haber say to you

when you spoke to her and said, "Do you know about your son's having been involved in drinking?" And you said to me, she said she didn't know about it, it must have been the bad kids he runs around with. Is that true?

A Mrs. Haber, as far as I can recall, stated to me a peer group type of kids to date. She was not aware of her son's drinking.

MR. WEITZ: I don't have anything further.

REDIRECT EXAMINATION

BY MR. GARDNER:

Q She said she wasn't aware of her son drinking at the first time you had called her, when she first signed for him in '69, right?

A Yes, sir.

Q You told her he was involved in drinking, didn't you?

A Yes, sir.

Q And the second time you called her, you told her again that he was involved in drinking, right?

A He was intoxicated the second time, sir.

Q You told her that?

A Yes, sir.

Q You told her on both those occasions, right?

A Yes, sir.

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MR. WEITZ: You did make a search to see if there was any trial, or any other proceeding, with respect to this second incident that you were just questioned about. You did that a few days ago at the request of the defendant, didn't you?

A Yes, sir.

Q You told them there was no record of any court disposition of that?

A I was unable to get any disposition, sir.

Q And, Officer, how old was this boy on that first occasion?

A Fourteen, sir.

Q How old was this boy on that second occasion; it's one year later.

A Yes, sir.

Q How old was he on that second occasion?

A Fifteen, sir.

Q Did you send the first record, the first fourteen-year-old record, to the Probation Department?

A Yes, sir.

Q Did you send the second one to the Probation Department?

MR. WEITZ: Objection. Where it went.

THE COURT: You asked it.

THE WITNESS: Yes, sir.

MR. GARDNER: That's enough. Thank you very much.

THE COURT: You're excused.

(Continued next page)

JOHN KELLER, having first been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

THE CLERK: State your name for the record, please.

THE WITNESS: John Keller.

DIRECT EXAMINATION

BY MR. GARDNER:

Q Mr. Keller, how was the traffic coming in this morning?

A Terrific.

Q You didn't make it at ten, did you?

A No, I didn't.

Q On the 29th of September, 1970, did you have occasion -- first of all, how old were you on that day?

A Eighteen.

Q '72?

A '72.

Q Did you have occasion to go to the Coliseum in Nassau?

A Yes.

Q Did you have occasion to see something, an occurrence, wite police officers and someone else?

A Yes, I did.

Q Mr. Keller, I want you in your own words, in your own style, your own pace, tell the foreman, ladies and gentlemen of this jury, what you remember, what you recall, what you saw, what you heard, on that evening in reference to that occurrence?

A Okay. I had gone to a concert that night with a girl I was going out with. We were coming out of the concert early because it was a terrible concert. As we were coming out of the coliseum, we were walking down one of the aisles where the cars were parked, and we heard some screams for help.

I couldn't tell if it was a woman or a man's voice because it was such a high scream. I didn't realize who was screaming for help until I saw what was going on. We walked down the aisle a little further, and I looked over to my right and there was a police car parked there with the front door open, and I saw this young guy in a tee shirt, and he was -- the police officer was in a crouching position and the kid had the cop around the back with his arms folded around the cop. The cop was down on the floor.

He appeared to be holding the cop below the belt by his genitals, and it was kind of a bizarre type of thing to see. I thought that there was some kind of fight going on. It appeared to me that the officer was acting pretty calm

about the whole thing, it was almost like he was trying to --

MR. WEITZ: Objection.

THE COURT: You can say what it appeared to you to be as you visualized it. Not your conclusion, but what you visualized.

THE WITNESS: Okay. What I visualized was a young man that was holding the cop, didn't seem like he was all there, from what I could see, because the cop seemed to be trying to reason with this kid and the kid was acting besark. He was going crazy with his arms and everything. There was a scuffle, okay?

What else I remember, there was a girl that came running up to the car and she jumped in the car, and she tried to radio for help. It looked like she was radioing for help, she grabbed the microphone in the car.

Then she jumped out. By this time the guy had let go of the cop, but he wasn't acting like he was there, he was there, but his mind wasn't there.

No matter what was going on, it was -- it looked like he didn't know what he was doing. And I'm trying to recall exactly what happened, what I saw.

I told the girl I was with to get down behind the car because I thought at any minute there would be

shots fired, because the police officer looked like he had gone through a lot, like he had been beat up.

Q When you say it looked like the police officer was beat up, what did you see about the police officer that made you come to that conclusion?

A He was dishevelled and he didn't look like he was all there, either. He looked like somebody beat him up. He looked like he was really abused.

The thing that went through my mind was how could he stand there and take there.

MR. WEITZ: Objection as to what was going through his mind.

THE COURT: You can't give sort of passing thoughts. You can't say what you thought.

THE WITNESS: What I saw was the cop was dishevelled, he looked like he had been beat up, but he didn't look like he was making any attempt --

MR. WEITZ: Objection as to what he considered, what he was doing and not doing.

THE COURT: I think that is all right. He didn't look like he was making an attempt to do what?

THE WITNESS: To go after the kid as the kid had gone after him. It was like he was trying to ignore what the kid had done to him, and he was going

to just forget about that and try to calm him down.

MR. WEITZ: Objection.

THE COURT: No. This is how he appeared.

MR. WEITZ: To this one, okay.

MR. WITNESS: He was going to calm him down. There was nothing he could do to calm the kid down. As time went by, he got more and more beserk. This is when I thought --

MR. WEITZ: Objection.

THE COURT: Not what you thought.

Q Did you do something?

A I told my girlfriend to get down behind the car because I thought that at --

THE COURT: Not what you thought. You told your girlfriend to go down behind the car. Not even internal thoughts. Just what you saw and what you did.

THE WITNESS: I moved a little bit closer to observe what was going on. This time they were behind the car, then I told her to get up, we walked over to my car, we had gotten to my car and I had -- was going to drive back up the aisle. Let's say you were the aisle where the cars were parked. In back of you would be where this was going on. So, we were observing

this from my right.

After she got up, we moved over to my car, we got into the car, we drove off, and came back down the aisle this way because I was going to come around and see if there was anything I could do because the cop didn't appear that he was going to last much longer and neither did the kid.

As we were coming down this way, I looked over to my left and I saw a scuffle going on between the policeman and the kid all the time this was going on not once did he reach for his gun, hit the kid, or anything. I didn't see him hit him. I saw the kid shoving him and pushing him and beating on him, but I didn't see him get on the kid at all. As we passed by and saw this going on behind the police car, I heard a shot go off and I told my girlfriend to crouch down in the car because I was afraid if the cop had a gun it would be all right, but if the kid had the gun the way he looked --

THE COURT: Don't give us your feelings, again, tell us what you saw, not how you felt. I know it's a big temptation to put yourself in that, you're telling what went on before you.

THE WITNESS: So I backed up to see what

happened, and the police officer was standing up and he was looking down at the kid, and he was shaking his head, and the kid was lying on the ground.

Q Did you ever see the shot go off, did you ever see the gun?

A I'll tell you the truth, I didn't see the gun.

Q And that is all you know about it; isn't that right?

A Right.

MR. GARDNER: That is all, your Honor.

CROSS-EXAMINATION

BY MR. WEISS:

Q When the police officer was standing over the kid, and the kid was lying on the ground, the police officer was shaking his head, you didn't see a gun?

A No.

Q How far away were you from this event that you just described?

A About from here to those seats.

Q Which seats, sir?

A The front seats, front bench.

Q Right here?

A Right.

Q Standing up or lying behind the car?

A Was the police officer?

Q You?

A I was in my car.

Q You were in your car?

A That is right. I just said that.

Q It was very tough for me to hear.

You find something funny about this, Mr. Keller?

THE COURT: I don't think was called for.

MR. WEISS: I see the witness laughing.

Q You were here yesterday?

A Yes.

Q You came to court by yourself or with others?

A By myself.

Q Did you discuss this case with anybody before you took the stand, sir?

A I discussed it, yes.

Q With whom did you discuss this case?

A I talked to one of the girls who had been there that night, but hadn't seen what I saw.

Q You say discussed it with one of the girls who had been there that night. Would you please tell us the name of the person you discussed this case with?

A I don't remember her name.

Q Can you describe the girl for us?

A Light brown hair, long.

Q When did that discussion take place?

A Yesterday.

Q Is that the only person with whom you discussed this case?

A I think I might have discussed more about the concert than the case, Mr. Weitz.

MR. WEITZ: May I have the question read back to him, Judge?

(Whereupon, the last question was read back by the reporter.)

A I talked to a lot of people about this case.

Q Will you please tell with whom you discussed this case?

A My family, my friends, the officer who interrogated me the night it happened, other acquaintances who might have come up, I talked to.

Q Anyone else?

A A couple of police officers in Queens District Attorney's office. I told them about it, what had happened.

Q Anyone else?

A No, not that I can think of.

Q Nobody else?

A I think I have named just everybody, I said

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friends, relations, acquaintances.

Q Are you sure you never discussed this case with Mr. O'Callahan?

A He's an acquaintance, I said acquaintances.

Q Did you drive home with Mr. O'Callahan?

MR. GARDNER: With O'Callahan? Did you drive home last night with Mr. O'Callahan?

A Yes.

Q Did you discuss this case with him?

A We talked about a lot of things. I don't remember if I had discussed the case with him. One of the girls might have been talking about the case, but I don't think I discussed it with him. I was talking about my jobs and neighborhood.

Q You didn't --

A I might have, I don't remember.

Q How did you know to come to court?

A Your Honor, the Judge told me to come in today.

Q You were here yesterday, how did you know to come to court yesterday, Mr. Keller?

A Well, Monday I was here, and I was told to come back yesterday, no, wait, Mr. O'Callahan called my house yesterday morning, and told me to come down.

Q When he called your house, didn't you discuss

the case with him?

A No. My brother talked to him, and then I picked up the phone and told him I would be here. He called me at one o'clock in the afternoon and told me to be here.

Q You got a telephone call from a total stranger, told you to be in the court and you said, okay, I'll be there?

MR. GARDNER: Objection. He is only making reference to the conversation he had on Monday.

THE COURT: Had you had a prior conversation with Mr. O'Callahan?

THE WITNESS: When he subpoenaed me. When he gave me the subpoena.

Q When was that?

A Last week. I don't remember what day it was, I am pretty sure it was last week. I'm not sure. It might have been the week before.

Q You can't remember; have you ever received a subpoena from a federal court before in your life, sir?

A No, sir.

Q And you can't remember even as to whether it was last week or the week before?

A No, I don't remember if it was served more than a week to me, or a few days before.

Q And you didn't discuss with the man that gave you the subpoena what is this about, what is for, did you, sir?

A I asked him what it was -- well, he identified himself to me and I had already gotten a couple of phone calls that the case was coming up and I knew what it was for.

Q So, even before a man came to you with the subpoena, you had, in fact, on the telephone discussed the events that you were going to testify to with some people, isn't that true?

A Yes.

Q All right, now, in addition to those two telephone conversations before you received the subpoena, didn't you go over your testimony with anybody else from -- associated with Mr. O'Callahan?

A Yes. Went over the testimony with myself. I ready my statements from the last time.

Q So, they spoke to you, they gave you something to read over?

A Right.

Q Because without those papers, you couldn't really remember the details?

A Yes. I could. I could, Mr. Weitz.

Q Can we have his statements, the original, do you

have it there, Mr. Gardner?

MR. WEITZ: Can we have it marked for identification?

THE CLERK: Statement marked for identification as Plaintiff's Exhibit 32.

Q Mr. Keller, would you read this over to yourself?

THE COURT: Okay, Mr. Weitz.

Q Have you read, sir?

A Yes.

Q Did you give that statement on September 30th of 1972?

A Yes.

Q And you gave that to a detective Perton, you gave it to a police officer, didn't you?

A Yes. I couldn't remember his name.

Q You read it over, and signed it?

A Right.

Q Signed both pages?

A Yes.

Q Was it true and correct when you made those statements?

A Yes.

Q You made those right at the time following this

occurrence when the events that you actually saw were fresh in your mind?

A Right.

Q Not something you discussed with family, or friends, but before you could talk this case over with all kinds of people, true?

A No. I talked to my brother and called the Nassau County Precinct after it happened and told them I was coming down.

MR. WEITZ: I offer this in evidence, your Honor.

MR. GARDNER: No objection.

THE CLERK: Plaintiff's Exhibit 32 received in evidence.

(Continued next page)

MR. WEITZ: May I read it to the jury?

THE COURT: Yes. You may.

Q 9/30/72. Above that in writing, your Honor, it left out, it says HOM 17M, statement of John Keller.

My name is John Keller and I reside at 110 Clovedale Boulevard, Bayside, New York. I'm eighteen years of age being born on October 28, 1952. The statement actually says 10/28/53. My home number is 224-6107, and I am presently employed by Horace Harding. I'm a general helper at the shop. Last night, Friday, 9/29/72, I and my girlfriend whose name I will not divulge had gone to the Nassau County Coliseum located in East Meadow, New York, for a concert featuring the Ten Years After.

Is that the name of the group, Ten Years After?

A Yes.

Q "We arrived there eight-thirty p.m., we watched the concert until about 11:30 p.m. and then decided to leave. We left the coliseum and was walking through the parking lot, I think it was the front of the coliseum. As we were walking and looking for my auto, a 1965 Ford Fairlane sedan, Registration No. Q6115NY which is owned by my mother Edith. I heard a voice yelling for help, the sound of the voice was coming from an aisle over to my right. I cannot say if the voice is male or female. At the same time I was looking

through the cars into the next aisle, we came to a point in the parking field when I saw a police car which was white, stopped in the aisle with the driver's sidedoor opened.

"I also saw at this time a policeman in front of the police car in a crouching position facing the police car. I also saw that a male white was on the policeman's back with his arms wrapped around the policeman's upper torso and pinning the policeman's arms."

So, when you saw them, your recollection --

MR. GARDNER: If he is going to read it --

THE COURT: Read it, then if you want to go back and ask questions, but don't editorialize.

Q "I heard the policeman yelling something like 914, at this same time I saw a blonde girl standing by the back door of the police door of the police car on the driver's side. At this time I told my girl that I think I should help the cop. She became frightened at the suggestion, I told her to stay where she was and crouch behind a car. I then started to walk to my car, but my girl insisted on being with me.

"I got into my car and pulled out into the aisle and started to drive back towards the coliseum. I was still in the same aisle I was walking in. As I approached the approximate location of the police car, I now saw the policeman

walking towards the police car, holding a white male by the hand, thinking that the cop had everything under control I was going to drive off. All of a sudden they started to scuffle again, and I saw the male white break away from the cop and jump into the police car behind the driver's wheel. I also saw the policeman attempting to get him out of the police car.

"I started to drive down the aisle, and I was at a point pass the police car when I heard what sounded liked a shot. I said to my girl, somebody got shot. I continued to the end of the aisle and then turned around in the same aisle and went back towards the cop car to see what I could see. When I got abreast of the police car, I saw the kid lying on the ground in back of the police car. The cop was holding his head standing next to the kid lying on the ground. At this time I started to drive away thinking the car was all right. As we were leaving the field, I now saw a lot of police cars coming in. I also directed a couple towards the spot of this incident. I then took my girlfriend home, then I went home. While at home, I started to think about this whole thing and decided to return to Nassau and relate what I had seen.

"I am now at the Third Squad and giving this statement to the detective that is typing it for me. I read it, and it

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is the truth. I have further been informed that any false statements herein are a Class A misdemeanor. Witness, Detective R. Petrone, signed, John J. Keller, II."

Is that the truth as you saw it that night, sir?

A Yes, it is.

Q Is that the whole truth as you saw it that night?

A Yes, it is.

MR. WEITZ: I don't have anything else.

REDIRECT EXAMINATION

BY MR. GARDNER:

Q On the 30th of September 1972, did you also give answers to questions that were put before you by the Assistant District Attorney Frank G. Keller?

MR. WEITZ: Objection.

THE COURT: I'll note the objection -- your objection from your chair which is overruled anyway.

THE WITNESS: Yes.

MR. WEITZ: I apologize, I had my feet crossed.

Q Did you give answers to certain answers that were put before you on the 30th of September 1972 by Assistant District Attorney Dillon?

A Yes, I did. 40 A

Q I ask you, sir, I'm going to read the question and answers that you were asked, the answer you gave, and ask

THE COURT: I assume, Mr. Weitz, you're familiar with the recent fabrication rule?

MR. WEITZ: I haven't claimed a recent fabrication.

MR. GARDNER: You did say it by --

THE COURT: I assume what he is going to do is show --

MR. WEITZ: May I see those Grand Jury minutes?

THE COURT: Not unless he has refreshed his recollection, I don't see anything through it, run through that consistent with anything he said.

MR. WEITZ: May I know, he testified in the Grand Jury minutes where he was when he made the observation to all these thingshe observed?

THE COURT: I don't see anything inconsistent of what he said, that is what I am saying. Now, I haven't read that testimony, but I assume it's the purpose for which the people --

MR. WEITZ: Yes, your Honor.

THE COURT: I assume you having asked questions specific to his temper, is that the whole truth, all the truth there was in that statement? At about the same time made an elaborated statement which is consistent with what he said here, he is able to bring it up.

MR. WEITZ: He is going to read the whole thing.

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MR. GARDNER: Yes.

THE COURT: There may be a few things that are objectionable which you can give me a transcript.

MR. WEITZ: Let me ask you, Judge, if the ADA asks leading and suggestive questions in this particular proceeding do I have a valid objection to such a question being read to this jury?

THE COURT: You may depend on what the text of his question is, but you may well -- I mean, I keep putting words into his mouth, one thing but if --

MR. WEITZ: I never was furnished with any of this material until long after the trial started.

I was prevented from making a motion to suppress any of this for the fact that it was suppressed and hidden by the defendant.

Now, under the circumstances --

THE COURT: Why couldn't you unearth these yourself?

MR. GARDNER: Isn't that what discovery is all about?

MR. WEITZ: When we were served notice we weren't furnished with these things. I'll show the Court the kinds of things we were furnished, we were furnished a detective report which incorporated my brief report which we were told there is an extra copy.

THE COURT: I don't know why you didn't make appropriate demands. If you conducted a pre-trial vourself instead of relying onsomebody else you may have more. If you leaveit to somebody else you can't come in and complain of his conduct.

MR. WEITZ: Well, Judge,let me show you what my problem is. A question is asked and the answer is given and the rest of it is all volunteering, I have no way of controlling a question and answer. Now, a question is made and he wants to --

THE COURT: Would you like five minutes to look; can you go down and mark out what you think is objectionable so you can object at the time.

MR. WEITZ: Your Honor, may we approach a side bar.

THE COURT: Yes.

(Whereupon a side bar conference was held outside the hearing of the jury.)

MR. WEITZ: I think it might be easier for the Court if I do it this way.

THE COURT: If I knew you were going to do it this way I would have let the jury go.

MR. WEITZ: If your Honor pleases, the last question on page 9, he didn't see the cops arms moving at all?

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THE COURT: That's leading in view of the answer before.

MR. WEITZ: After the reading of the answer no, after the word no I object to, Judge, in other words, I object to that is why --

THE COURT: I'll allow the answer to stand.

MR. WEITZ: Just in support process.

THE COURT: In purpose of this author is to show his present testimony was not a recent fabrication. One of the implications of your reading from that statement was to show it was.

MR. WEITZ: All right, well then Judge, my objection is to all the answers which contain this witness' thought process. I think --

THE COURT: That is why I think he's going to throw them out.

MR. WEITZ: It's his reasoning, Judge.

THE COURT: Is there prior testimony to that fact?

MR. WEITZ: I'll withdraw that. It's the next one.

THE COURT: I see what you're saying on page 8 he does testify, I'll allow the question to stand.

MR. WEITZ: I don't care about that one. Can I go to the next one, page 10, below the belt now,

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this is not -- this is strictly this witness' thought process, because why wouldn't a copy fight back, the guy didn't look like he had any weapon in his hand.

THE COURT: I'll take the because out, but I believe the guy didn't --

MR. WEITZ: Then I withdraw it, Judge.

I want it all out, not part of it out.

THE COURT: It's consistent with what he said before.

MR. WEITZ: I object to the question, Judge. All right, we'll go to page 12 now. Last answer everything, after I told him I told my girlfriend I had to help the cop. That is what he said not anybody else.

THE COURT: They're not responsive.

MR. WEITZ: That is what I thought there, your Honor.

THE COURT: Except so she got in the car with me.

MR. WEITZ: That is right, Judge.

MR. GARDNER: What you do -- I told my girlfriend I would help the cop. That is what he did, he said that.

THE COURT: I could edit to the point I told my girl I had to help the cop. I saw he was desperate

so I told her to get behind the car, stay there.

MR. WEITZ: That is his conclusion.

MR. GARDNER: That's what he saw.

THE COURT: He saw he is desperate.

MR. WEITZ: The word desperate is not a description, it's a characterization. It's not a physical thing.

THE COURT: Wait a second, I'm going to edit the rest of it.

MR. WEITZ: Judge, I object to editing, I have made my objection.

THE COURT: You want the whole answer out?

MR. WEITZ: I want the whole answer out.

THE COURT: I can't dothat. I can get to what he saw and what he did out.

MR. WEITZ: I'll object to the entire thing, if your Honor is ruling against me on that I want the whole thing out.

THE COURT: I'll allow what he saw and what he did, but I'll not allow anything else.

MR. WEITZ: I don't know what that means.

THE COURT: In the context of the sentence, I saw he was -- the girlfriend I told her get behind the car, stay there and I think all the way down, all right,she got in with me.

MR. WEITZ: I have no objection to the first part on page 13, let him read first paragraph, page 13.

THE COURT: In other words, you don't want an editing.

MR. WEITZ: I want it out.

THE COURT: I'm willing to head it, except to what he saw and what he did.

MR. WEITZ: I don't think it protects my client's interest at all to edit.

MR. GARDNER: So the whole thing --

THE COURT: The whole thing goes in.

MR. WEITZ: I think we should let this jury go to lunch. Read it in and get it over with.

You see now, Judge, question page 14 here's a question so you were looking over to the police car, you were looking to your left or right. Anything after my left is not responsive.

MR. GARDNER: You see, Judge, that is what he said and that is a consistent statement. I don't care if he was asked a question about it or not, he made a consistent statement.

THE COURT: I'm going to instruct the jury in any event that this is being offered for the purpose of showing a prior inconsistent statement, and not for any other purpose, not for the truth of any of the

matters.

MR. WEITZ: I appreciate it, your Honor, but I still want to --

THE COURT: I think I have to, in light of all this being offered. I don't see how I can exclude it.

MR. WEITZ: You see, Judge, here is an answer on here question on page 5, last question, so when the shot went off it was sort of from the back of you and the answer yes, but after that it is all what he said to the girl, what he thought about the situation, and that is not, this is all expression ofthis man's thoughts.

THE COURT: I'll agree with that.

MR. GARDNER: Just stop at yes, okay?

THE COURT: You can add I was going back there, I made a complete turn, went back down the aisle.

MR. WEITZ: The next question is necessary, Judge.

THE COURT: Just to answer yes.

MR. WEITZ: Page 20, your Honor, all right, it doesn't matter. Here, Judge, 21:

"Question: In your opinion was the officer taking an awful lot?"

Being in evidence from this man, under the circumstances of you read this entire statement of what

you could see, or what he is in a position to see.

MR. GARDNER: I wouldn't read that.

THE COURT: That is the easiest decision I had to make all day.

MR. WEITZ: Page 22, Judge. First question, you feel that officer exhibited a lot of patience to this fellow. First question again, his opinion as to particularly in light of what he saw, he exhibited patience.

THE COURT: He attempted --

MR. GARDNER: He testified to that.

THE COURT: He testified to it, it's consistent, it's not in the statement --

MR. WEITZ: That's leading and suggestive question.

THE COURT: He's already said in this trial and earlier in this transcript, as I recall, I am going to let it in, again not for the matter of truth, but for the consistency.

MR. WEITZ: How about the last question, page 22, Judge, it's possible to have, and continuing on 23 first full question on 23, what is possible, and it's calling for conjecture and conclusion.

THE COURT: I think that should go out.

MR. WEITZ: Last question on22, first question

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on 23.

THE COURT: Wait a minute.

MR. WEITZ: It's only operation of his mind, Judge.

THE COURT: Wait a second.

MR. GARDNER: I'll tell you what, Judge, in response to the question, is it possible perhaps the cop might have hit the ground and not see it and go over to page 23, what did you see.

THE COURT: It could be posture, because I saw the way --

MR. WEITZ: You can't have it both ways, Judge. He wants to have an answer. He wants to have a partial answer leaving out the fact that he was not in a positior to tell, and readingit as I have, he was in a position to tell and answering.

MR. GARDNER: Picking up from the word I saw.

MR. WEITZ: You can't edit it that way.

whether or not those are a -- are the questions and answers that you gave?

MR. WEITZ: Objection.

(Whereupon, a sidebar conference was held.)

Q You recall Mr. Weitz showed you a statement that was typed on the typewriter, which you signed, was it being typed while you were talking; do you know?

A Yes, it was.

Q That typed statement you signed, that wasn't the only version you gave to anybody?

A No. That was the immediate version I gave to the police officer's desk.

Q On September 30th, 1972, you gave another statement to questions that were asked of you by the Assistant District Attorney?

A Right.

Q That is what I am reading from.

"Question: How do you do, John?

"Answer: How do you do.

"Question: I'm an Assistant District Attorney. I would like to ask you some questions. This is Mr. Donald White. He is a Confidential Reporter from the District Attorney's Office and he's going to put down everything we say in this room on that machine,

okay?

"Answer: Yes, sir."

Q Is that similar to the machine the Court Reporter is using now; your words as they were being spoken were taken down exactly as you said it?

A Right down to clearing my throat.

MR. WEITZ: I would object, it's not certified.

Q By the way, do you recall; was that machine going faster than the typewriter with the detective?

A Yes.

Q Question on page 2, your Honor, open quote: You met Detective Banadello?

"Answer: That's right."

MR. WEITZ: Mr. Gardner, one moment, please. I thought we were going to have it in somewhat a different form. If he was going to be answering these questions --

THE COURT: I have these questions read to the answers given. We can do it, you interrupt if there is any answer, whichever way.

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Q By the way, before you took the stand you had an opportunity to review the transcript of the District Attorney's questions and answers, didn't you?

A Yes, I did.

Q So, if there is anything in there different, you'll let us know?

A Right.

Q "Question: For the record, tell us your name and address?

"Answer: Full name?

"Question: Yes.

"Answer: John James Keller, the second, and I live at 6110 Cloverdale Boulevard in Bayside.

"Question: How old are you, John?

"Answer: Soon I'll be 19, in October.

"Question: Okay, now --

"Answer: This is October.

"Question: Who do you live with at that address?

"Answer: My mother and brother Kevin, my sister Hattie.

"Question: Do you go to school or are you employed?

"Answer: I go to Queens Borough College.

"Question: First year there or second?

"Answer: Second year.

"Question: What do you study there?

"Answer: Right now I am taking required courses. I am going to go into pre-law next year.

"Question: And you are also employed at a florist?

"Answer: Yes. Kell Brothers Florist in Bayside.

"Question: Okay. What do you do there at the florist's?

"Answer: I just help around the shop and stuff.

"Question: Of course we're talking, it's Saturday morning September 30th. Last night on the 29th did you go to the Nassau County Coliseum?

"Answer: Yes.

"Question: Did you go alone or with somebody?

"Answer: Went with my girlfriend.

"Question: What is her name?

"Answer: I already told the detective there outside I didn't want to mention her name.

"Question: Well, all right. You went with your girlfriend.

"Answer: Right.

"Question: And you went to the concert?

"Answer: Yes.

"Question: What time did you and your girlfriend get there?

"Answer: About 8:30 because we were late.

"Question: Let me ask you this, didyou and your girlfriend go just the two of you alone, or did you go with a group?

"Answer: Just me and her.

"Question: How did you get there?

"Answer: By car, my car.

"Question: What kind of car was that?

"Answer: Ford Fairlane 1965.

"Question: Is that your car?

"Answer: It's my mother's.

"Question: You got there you said about what?

"Answer: 8:00, 8:30.

"Question: And you got there what, 8:30?

"Answer: Yes.

"Question: HOw long did you watch the concert ?

"Answer: Until I think we left around 11:30.

"Question: Was the concert over at that time?

"Answer: No, Ten Years After had just been playing, but they just hit a couple of songs, we decided to leave.

"Question: What time was it you left; if you

remember.

"Answer: About 11:30.

"Question: And when you left the Coliseum you went out I presume to look for your car?

"Answer: Yes.

"Question: What occurred at that point?

"Answer: I was walking down the aisle, towards -- you know, the aisle my car was in and me and my girlfriend heard somebody scream for help. But, you know, like me trying to find out who was screaming I didn't know who it was, whether it was a man or a woman.

"Question: I was just going to ask you, you couldn't tell the voice?

"Answer: I cculdn't, I couldn't.

"Question: The voice was saying "help"?

"Answer: Yes. Because I wasn't thinking about telling who was saying it. I wanted to see who was saying it. I wasn't thinking whether it was man or woman. I wanted to get a look what was happening.

"Question: Was it high pitched?

"Answer: I don't remember.

"Question: Was it more like a scream?

"Answer: You know, help, help. You know, like that.

"Question: You couldn't determine whether it was a man or a woman yelling?

"Answer: No. It could have been a man.

"Question: And how far away from you was this voice?

"Answer: It was right near me because I knew -- just that it was right on my -- it was towards my right on my right side.

"Question: Now, just for convenience sake, would you tell us your girlfriend's name so you don't have to say your girlfriend each time?

"Answer: Okay. Julie.

"Question: Julie?

"Answer: Yes.

"Question: Did Julie come along with you?

"Answer: Yes. She kept following me, she was with me.

"Question: What did you see?

"Answer: We were trying to see where, you know, where -- you know, what was going on and we saw a cop car parked in the aisle on the next aisle, over on my right and -- you know, I saw a copy car. I kept on walking. I still was looking between the cars because I didn't see anybody at first.

But, then I saw the cop crouched down facing the car and you know, the kid who was involved with, you know what happened, he was involved.

"Question: You say the kid was involved, would you describe what you saw the kid do?

"Answer: Yes. That is what I am getting to. He was on top of the cop and the cop was crouched down and the kid was holding him from the back in his arm like that.

"Question: He was on the cop's back?

"Answer: Yes.

"Question: And he has his arm folded around the cop?

"Answer: Yes. It looked like he had him in some kind of hold below the belt, because the cop wasn't making any moves at all. He was yelling for help and he was also --

"Question: The copy was calling for help?

"Answer: Yes. He was saying 914, somebody call 914. He kept saying that. It may be 914, I don't know.

"Question: Where was the cop at that time; by the right side of the car?

"Answer: He was in front of it, facing it.

"Question: Facing the front -- the cop wasn't saying help then, he was saying --

"Answer: He was screaming help, youknow, he was like, he couldn't make any move.

"Question: This man was on the back of the police officer with his arms wrapped around the police officer, is that right?

"Answer: Yes.

"Question: Did he have his arms outside the policeman's arms; in other words, were the policeman's arms pinned in?

"Answer: I told the other detective, because the cop, you know, he couldn't move at all.

"Question: YOu didn't see the cop's arms moving at all?

"Answer: No. That is right. I think he was holding him below the belt.

"Question: Below the belt?

"Answer: It appears that way, because why wouldn't the cop fight back? The guy didn't look like he had any weapon in his hand or anything.

"Question: You heard the policeman say 914, is that it?

"Answer: Yes.

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"Question: Could he be saying signal 14?

"Answer: Signal 14.

"Question: Did the police officer have a radio in his hands or anything like that?

"Answer: No. I just heard him yelling.

"Question: He was yelling help and signal 14, is that it?

"Answer: Yes. Something like that.

"Question: Or 914, or whatever you thought he was yelling?

"Answer: Yes.

"Question: Now, did you see anybody else at that time?

"Answer: I saw a blonde haired girl, you know, straight, straight blonde hair sort of.

"Question: Where was she?

"Answer: She was at the back of the car right by the driver's side, the backdoor. Because I remember when I saw her I was thinking to myself she was in the car or something like that. I thought she might have been in there or something like that."

THE WITNESS: I just remembered something, that blonde haired girl --

MR. WEITZ: If your Honor please,

THE COURT: Is there a question and answer that was incorrect that was given? Incorrectly typed in your opinion, not what you now remember?

THE WITNESS: It's not what I remember --

THE COURT: The question is, is there something incorrectly transcribed here?

THE WITNESS: Not -- then it isn't, your Honor.

MR. WEITZ: You had a recollection?

MR. GARDNER: You had a recollection of something?

THE WITNESS: Right.

MR. GARDNER: So far the questions and answers that you gave on the 30th of September '72 that I read are all right?

THE WITNESS: Yes.

"Question: All right now, the girl was outside the car, is that right?

"Answer: Yes.

"Question: And she was by the left side of the car?

"Answer: Yes.

"Question: Back door?

"Answer: Right around that area.

"Question: And the police officer in this manner in front of the car?

"Answer: Yes.

"Question: Not on the right side of the car, but in front of the car?

"Answer: Well, like towards the left, you know. They were in front of the car but sort of like on the left front, you know.

"Question: To the left headlight?

"Answer: Yes. Around that area.

"Question: Okay, now, were they facing towards the car at that time; was the officer facing towards the car?

"Answer: Yes. WEll, when he was crouched, he was facing towards -- you know, like the direction of the front of the car like the car was facing him.

"Question: The cop was in front of the car and facing towards the car?

"Answer: Yes.

"Question: The girl was by the left rear door and the man had his arms wrapped around the cop?

"Answer: Yes.

"Question: All right, now, what did you do at that time?"

MR. WEITZ: I believe your Honor has ruled I can read this entire thing. Am I correct; that is my

recollection.

THE COURT: I said my ruling was different, but he said he wanted you to read the whole thing.

"Question: All right, now what did you do at that point?

"Answer: I told my girlfriend I had to help the copy because I saw he was desperate and I thought I would help him. So, I told her to get behind the car, stay there, any car, pick one and stay there. She kept yelling no because she thought I was going to get hurt. I was going to drive the car into the aisle wherever he officer was because I thought by this time the kid would be up. Just, you know, he was acting so crazy, you know, I thought he was going to kill him, kill the cop, she kept screaming no, no, you're going to get hurt, you can't leave me here. I said, "All right, come on." So she got in the car with me.

"Question: Your car was parked nearby then, is that it?

"Answer: Yes. It was right up, pretty near by.

"Question: So what did you do then?

"Answer: We both got into the car and I drove down the same aisle I was walking back towards the Coliseum, I was coming up the aisle at first, but when

we got into the car I was going down the aisle and that made the cop on my left now.

"Question: Where, where now -- were you then driving towards the Coliseum?

"Answer: Right.

"Question: Okay.

"Answer: And I remember looking through the cars and I saw the cop holding him by the hand or something.

"Question: By the hand?

"Answer: Yes. Sort of holding his arm or something. I said what's going on because when you are looking through the cars you keep seeing flashes, you can't see the whole picture.

"Question: You were not in the same aisle as the policeman was then?

"Answer: No. I was in the aisle next to him.

"Question: Were you looking to the left or the right when you were looking over to where the police car was?

"Answer: To my left, he was holding him, it appeared he was trying to do anything but hurt the kid. Like he was thinking an awful lot and like this kid kept going crazy. Then they started -- a scuffle

started and I can't remamberhow it happened, but the cop was trying to defend himself and the kid was fighting, and then I remember the kid tried to take off with the car.

"Question: He jumped into the police car?

"Answer: Yes.

"Question: HOw did he get into the police car; through the right door or left; if you remember?

"Answer: The driver's side, because the driver's side door was open and I said to my girlfriend, I don't believe it, he is trying to steal the car, the cop is trying to stop him. I kept on going, you know, I didn't see anything after that. Then all of a sudden I heard a shot go off.

"Question: All right, by this time had you passed the police car?

"Answer: Right.

"Question: So that the shot -- so when the shot went off it was sort of like in the back of where you were, okay?

"Answer: Yes.

"Question: All right, now, when you made a turn did you turn right, back in the same aisle or the aisle where the police car was?

"Answer: I turned back in the same aisle I think. All I know is I turned around, I was --"

MR. WEITZ: Wait, are you reading on page --

THE WITNESS: Sixteen.

MR. WEITZ: Didn't your Honor rule it was only to read the first word?

THE COURT: Yes. He is on the next question.

"Question: All right, now when you made a turn did you turn back in the same aisle, or did you turn back in the aisle where the police car was?

"Answer: Turned back in the same aisle I think, all I know is I turned around, I was heading down the same aisle again and this time I passed the car and the kid was laying on the ground. I don't remember if he was lying facing up or facing down. The cop was standing over him holding his head like this, shaking his head and all --

"Question: Holding his head and shaking his head and had one hand by his face?

"Answer: Like, you know, like it could have been avoided, kind of a gesture, you know.

"Question: How many shots did you hear?

"Answer: One.

"Question: Just one shot?

"Answer: Yes, there could have been two, but only one registered with me. That is when I turned around and went to see what happened.

"Question: Now, when the kid was lying there where was he in relation to the car?

"Answer: He was in the back of the car.

"Question: How was he lying?

"Answer: He was lying down but I don't remember if he was facing up or facing down.

"Question: Do you remember if his head was nearest the car or his feet?

"Answer: I think his head, and the police officer was standing next to him. I think it was his head, and the police officer was standing next to him.

"Question: Then what did the police officer do?

"Answer: I don't know, because I was looking at the kid and I said to my girlfriend, 'I said, do you think he is dead? And she said no, he is still moving. I said I was going to turn around. She said no, go around the aisle, see if the officer is okay.'

So I was going to do that, I kept going down the aisle, I was going to come around the aisle that the police officer was in and all of a sudden like an army of cops, I said, you know, he's okay.

"Question: Did you go out and talk to any of the officers?

"Answer: I directed a couple of cop cars. They were coming in blindly, like the wild -- the parking lot was full, the concert wasn't over yet.

"Question: And?

"Answer: I told them where.

"Question: Did you take Julie home yet?

"Answer: Yes.

"Question: Then you came back to see if you could assist in any way?

"Answer: Yes. After I went I took her home and I went home and came back.

"Question: When you saw this fellow, he was on the back of the cop when you first saw him and he had his arms around the cop hitting -- did you notice if he was a sergeant or patrolman?

"Answer: I didn't notice.

"Question: Do you know why?

"Answer: Because he was looking -- his hat was off.

"Question: Was his hat off when you first saw him also?

"Answer: Yes. Because I remember he had like

blondish hair like.

"Question: How about the fellow that was on his back? What kind of hair did he have?

"Answer: Stringy curly like, long.

"Question: Like Afro-type?

"Answer: Sort of, yes.

"Question: Was he white?

"Answer: Yes.

"Question: Did he appear to be a husky fellow?

"Answer: Slim.

"Question: Did you see the fellow at any time on the -- even before that?

"Answer: No, I didn't.

"Question: This blonde girl, did you get a good look at her?

"Answer: It just looked like she was in on it because I couldn't hear what she was saying, because I was in the car at the time and the windows were rolled up. She looked like she was saying something then she disappeared. She disappeared right after the cop started saying somebody signal 904 or something. I said she must have gone to get help.

"Question: How was she dressed?

"Answer: Wearing a dress or something, I don't

remember the color. He was wearing a T-shirt, maybe white, is that correct?

"Question: So you never got any closer to him than one aisle away, is that right?

"Answer: Right. It's like two car lengths because the car length --

"Question: And you feel like the officer exhibited a lot of patience towards this fellow?

"Answer: Right. I really do.

"Question: Did you ever see the officer; do you know, on the ground?

"Answer: On, you know, in a crouching position I remember, down on the ground.

"Question: When was that?

"Answer: When the kid had him around the back.

"Question: I see. When you say crouching position he was on his knees perhaps?

"Answer: Like, like you know, just like that.

"Question: On his haunches so to speak?

"Answer: Yes, right.

"Question: And he bent over and the fellow was --

"Answer: Over him like --

"Question: So, by the time you went down and turned around and went back, is it possible that --

possible the cop might have hit the ground and not seen it?

"Answer: Could have been possible, because I saw the way the kid -- the kid was trying to steal the car and I knew he was going crazy then. I knew something had to happen.

"Question: Did you see the officer pull him out of the car?

"Answer: Pulling at him, is that it?

"Question: When you cameback and saw the police officer holding his head and sort of shaking his head, did you see the gun at that time?

"Answer: No. I didn't.

"Question: All right, anything you can think of?

"Answer: No. That is about it.

"Question: Thank you very much.

"Answer: Okay."

THE COURT: We have had enough. Hold your questions until after lunch. Youcan ask him whether there is anything that is incorrectly transcribed.

THE WITNESS: Everything seemed correctly transcribed to me.

THE COURT: You're to take that statement that was read to you not for the truth, but solely to

determine whether or not there is anything inconsistent to what he has testified to you, or whether it's a consistent statement. That is what it is offered for in the light of cross-examination.

Have a good lunch. Don't discuss the case. We'll see you as close to 2:30 as possible.

(Whereupon a luncheon recess was taken.)

THE CLERK: Would you state your name and address for the record.

MR. NEWMAN: Robert Newman.

R O B E R T N E W M A N , having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Will you please speak loud enough so that this woman on the end can hear what you have to say.

Are you a physician duly licensed to practice in the State of New York?

A Yes. I am.

Q Are you licensed to practiced in any other states besides New York?

A In Ohio and California.

Q Dr. Newman, would you be kind enough, please -- it's hard for someone -- tell the members of the jury what your medical education was, background, internship, residentship, hospitals you worked in, positions you held, teaching positions and the like, to get some idea about your background.

A I graduated medical school from Rochester University in '63. I had internship and residency training in surgery at University Hospital in Cleveland.

I worked for two years in a clinic in the United States

Air Force, and then returned for a three year residency in public health with the City of New York, Department of Health. I took a Master's Degree in Public Health at the University of California in '68. From 1970 until '75 I was the Assistant Commissioner in the New York City Health Department in charge of the Department's addiction program.

In 1975 I resigned from the City and became a consultant in the area of substance because to the World Health Organization the United States Government, to the Drug Abuse Council and to a number of foreign countries including Hong Kong and the Government of Thailand.

During that year I also wrote a book about drug abuse and the New York City Health Department programs in the field of drug abuse.

Most recently, about three months ago, I assumed the position of Associate General Director of the Beth Israel Medical Center, New York City.

Q Do you hold any teaching positions?

A Yes, for over two years I have been on the faculty of the Mount Sinai School of Medicine, four years I have been on the faculty of the University of Utah School of Alcoholism and Drug Dependencies.

Q Board certification?

A I am Board specialized in Preventive Medicine.

Q During the period of time with those associations have you had to direct personal clinic experience with drug users and their treatment?

A In two general areas, with respect to the patients in the City Health Department addiction programs and before that I didn't mention before, I worked for two years in the New York City prison system as a physician, primarily responsible for the intake examination of inmates at the time of incarceration.

Q Could you give us some idea approximately how many drug users you had seen on a clinical basis?

A I would say it numbers in the thousands.

Q By the way, did you have any position under the Special Office for Drug Abuse?

A I was a consultant to the President's -- for drug abuse prevention and also to the agency which was created when that office was closed, namely the National Institute for Drug Abuse.

Q Did my office send to you certain information requesting your view of the underlying facts involving Mr. George Haber that brings us to court today?

MR. WEITZ: Objection as to form, your Honor.

Q Did I engage your service as an expert in drug abuse to review a particular file involving one George Haber?

A Yes, you did.

Q Approximately, when was that that you first received that material and did your review?

A I believe it was the end of October or end November of last year.

Q And did you in that review have an opportunity to look at the autopsy, toxicology report?

A Yes, I did.

Q At both Mr. and Mrs. Haber's deposition or examination before trial?

A Yes.

Q Mr. Shomeyer's deposition or examination before trial?

A Yes.

Q And in addition, did you also see the autopsy report, Doctor?

A Yes, I did.

Q Doctor, we have had some discussion by some lay person, young people, about certain words like LSD and tripping and hallucinating.

I would like to ask you if you can please, in terms as I as a layman and members of the jury can understand, will you describe the basic, what LSD is -- not from its chemical compounds, but basically what kind of drug it is and

what effect if anything it has in terms that a jury can understand?

A Yes. LSD is a substance that falls under the general category of hallucinogenic or psychogenic drugs. I will explain what each of these categories means.

A hallucinogen is a drug that produces, in the person that takes the drug, hallucinations, in other words, seeing or hearing, in other ways perceiving things that really are not there. This is a hallucination and that type of phenomenon is produced by drugs in this category, which include LSD.

It's also what is called a psychotogen drug, in that it produces a psychotic like state.

Psychosis, the simplest definition of psychosis is an inability to correctly perceive reality. Inability to perceive things as they really are. This is characteristic of a number of diseases, including schizophrenia and also typical of the effect that drugs in this category, including LSD, produce.

There are a number of examples. People can perceive, understand the influence of a drug such as LSD. In other words, see things or hear things that simply don't exist or even more commonly, they can falsely perceive things. They can see a wrinkle on a pillow case and think it's a mountain. They can see somebody and believe they can detect the pores, little openings in the skin that are in fact

invisible.

The way they respond to the things they see and hear, and things they see and hear is typical with this type of drug and condition, is typically inappropriate. They react in a way that: No normal person would react.

So these are the characteristics of this group of drugs and LSD is the most potent, the strongest psychotogenic drug in this category.

Q Is there a term in medicine for the use of two kinds of drugs at the same time, a term known as potentiating?

A Yes. Potentiating, p-o-t-e-n-t-i-a-t-i-n-g.

Q Let me take it step by step. I am trying to make it clear in my mind and the jurors minds:

When a person goes to a doctor and the doctor prescribes certain drugs, the doctor will ask the person what else --

MR. WEITZ: This is leading and suggestive. Mr. Gardner is testifying.

THE COURT: The doctor can explain it a little better than you can.

Q Please describe to the jury what the term potentiating means, two drugs.

A Potentiation is a phenomenon, two drugs, each of which has its own specific action, when they are taken

together the action of each is accentuated or potentiated. So, not only is it a combination, not only is it a case of getting the result of experiencing the effect of each drug individually, but in fact the result of each drug is much greater than it would be if taken alone. So they act to potentiate or enhance, or increase the effect, one or the other.

Q One of those, one plus one, doesn't make two, but may make five?

MR. WEITZ: Objection to the form.

THE COURT: Sustained.

Q Tell us whether or not taking marijuana at the same time or in close proximity to taking LSD potentiates, increases the effect of the LSD effect on the body.

A It very definitely can do that.

Q Somebody takes LSD, there is a period of time before it starts to take effect in the body and if so, how long before the LSD takes effect?

A It varies with the individual and varies with the amount of the drug that is used. But, generally, when it's taken by mouth, the effect of LSD becomes noticeable within 30 to 45 minutes.

Q How long does the effect last?

A It varies with the dose and also with the

individual. But generally the effect lasts between four and eight hours.

MR. GARDNER: Can we have the toxicology report? I believe you produced it.

Q Doctor, you looked at the autopsy report and it's in evidence. There is no issue, it shows on the toxicology report after the event and when George Haber finally got to be autopsied, a certain amount of blood was taken out of him?

A Correct.

Q And that amount of blood was 100 millilitres, correct?

A I'm not sure.

MR. WEITZ: I'll agree it's 100 anograms.

Q Would you agree that at the time of autopsy 200 nanograms within 100 millilitres of the blood, nanograms, 100 millilitres.

How large is 100 millilitres?

A Three and a third shot-glasses.

Q That means for every three and a half shot-glasses of blood there is 200 nanograms, if you're that good.

Approximately, how many shot-glasses are there of liquid blood in the body?

A To put it in rough terms, there are between

five and six litres or 5,000 to 6,000 millilitres in the human body; so there would be approximately 50 times the number of shot-glasses, or the number of hundred millilitures blood samples that are analyzed.

Q You had 50 times 200 millilitres within the body.

MR. WEITZ: That is Mr. Gardner's --

THE COURT: That is Mr. Gardner testifying.

MR. GARDNER: I think it's only a mathematical question.

Q Doctor, you tell us how many nanograms there would have been within George Haber's body in his blood at the time that toxicology report was done.

A Within the blood, because that was the only thing that I recall the analysis, whether it was with respect to 100 millilitres of blood of blood.

Since there are altogether 5,000 to 6,000 millilitres of blood, this would mean that in the blood in this person it would be about 50 to 60 times 200 or in other words somewhere between 50,000 and 60,000 nanograms of LSD in the blood of this individual.

Q Is that a toxic amount?

A It's an amount that very definitely produces the effects of LSD. It's toxic in that sense.

Q By the way, what is the usual method of determining how much LSD is in the human body; what is the method used?

A By analyzing the blood and then calculating from the amount of blood that you have taken, how much would be in the interior body.

Q In your experience is LSD purchased, can it be purchased on the street other than a pharmacy or other than from a drug counter?

A Very definitely. It's one of a great number of drugs that is available on the so-called black market, that can be purchased illicitly.

Q On that black market, what has been termed the street, different studies and literature investigation, as to any concern relevant to the purity or non-purity of that kind of drug?

MR. WEITZ: Objection, why I don't even understand.

THE COURT: I think you can ask the Doctor if he is aware, based on his experience on what range LSD's potential is.

In other words, Does it come in a single type potency effect or does it have a range of potency.

MR. WEITZ: I don't have any objection to that.

THE WITNESS: It has a wide range of potency, depending upon how much is in the particular tablet, or whatever that is purchased, or taken. There is a tremendous range, it is not the same regardless of the manner in which it's purchased, or the amount of it that's taken, so there is a great range in the potency, or strength of the drug.

Q And in the black market that is where when people want, they can purchase LSD on the street. Do you know whether or not the LSD that is sold in that kind of a street market is mixed with anything; whether or not it's all pure?

MR. WEITZ: I am going to object, your Honor, it's going far afield from this case. We have no idea other than a description that was given.

THE COURT: I don't think it's material, Mr. Gardner.

Q The average kid goes out on that black market to buy LSD, is there any way to know what kind bang he's going to get?

A Absolutely no way to know.

Q Doctor, I want you to assume the following facts.

Assume that an 18-year old boy, 5'9", 158 pounds, is out

to the Nassau Coliseum September 29, 1972. He has an LSD tablet in an aluminum foil that he bought or obtained some way.

About 8:30 or so he takes that tablet, thereafter he smokes marijuana, that he had come with a friend that had driven him. He had no way of getting back to his home which was approximately Spring Valley, or Muncie up state. His friends expected that they would take him back and he leaves his friends; some later time he is seen saying to one of the guards that he is a rock guitarist, Alvin Lee, tries to get back into the Coliseum and he is not permitted back.

The guy is on the floor on his stomach looking up and thereafter he meets two girls in a parking lot, grabs one of the girls, wouldn't let go, the other girl tries to take him away but one hand on the buttocks, one on the waist, the girl breaks loose, the young man breaks away or chases them.

The girls go to tell the Policeman, while this young man is walking down one of the aisles.

I want you to assume the Policeman stops some distance away and calls to him. The Policeman I want you to assume is in his uniform, has a badge, has a police car, calls to this lad and tells him to stop and identifies himself as a Police Officer. The boy doesn't stop but continues walking.

Doesn't run, continues walking.

The Policeman tells him to stop a second time, identifies himself as a Police Officer and the boy continues to work.

The Police Officer approaches him,puts a hand on him, the boy offers no resistance. With the Police Officer holding the boy with one hand, docilely walks back toward the Police Car. On the way back to the Police car the boy suddenly from his docile attitude turns violent and the struggle ensues between the Police Officer and boy, during which time the Police Officer tries to subdue him by hitting him on the side of the head with the blackjack, and the boy, to the Police Officer's sight, there is no indication of any feeling of it, no effect.

The boy grabs the jack away from the Policeman, grabs him around the body and gets down on the ground and now the boy becomes docile again sitting there with the Police Officer in some manner, one holding on to the other.

The Police Officer then speaks very quietly and soothingly to a girl who has arrived with a friend in a car and can't get past the car because of their position in the roadway.

At that time the boy is so docile he puts his head on the shoulder of the Officer. The Police Officer instructs the

girl to make a call on the microphone, there is confusion, then the Policeman -- every time the Policeman -- every time he starts to get up, the boy tenses, so the Policeman sits there for a while, then the Policeman rises to go over to use the microphone because of the apparent confusion in being able to get the information through the girl and the boy walks quietly with him towards the police car.

I'm sorry. The Policeman rises, he grabs the boy by the boy's right arm, and leads him to the police car.

At some point, as they're right near the police car, the police car's motor is running, engine is on. As they get to the door of the police car the boy turns violent again in the sense he rips away from the Policeman's grip and the Policeman loses control of him.

The Policeman is 6'3", weighs 180 pounds. The boy jumps in the car and he starts to rev the engine by depressing the accelerator several times, but never puts the car into gear, never moves the shift into drive.

A struggle ensues between the policeman and boy. Words are traded back and forth and assume at some point the Policeman -- the boy reaches for the Policeman's weapon which is on the POliceman's right side and a struggle ensues for the possession of the weapon, in which the -- in an attempt to get possession.

That struggle goes outside the car and this boy and the Policeman in a violent struggle back and forth, bodies being banged against the car, the struggle ensues around the back side of the car, still in the struggle to get possession of the weapon when the weapon goes off a second time and the boy slumps to the ground.

I want you to assume that the Officer is seen, when he down on the ground, dissheveled, shirt ripped like some kind of a struggle was going on.

I ask you on that factor, in addition to assuming that after the body of that boy is taken to the morgue there is found two hundred anograms per one one hundred millilitre of LSD in his blood, and there is also found, according to the toxicology report that there is marijuana that was present, because of swabbings of the teeth and lips.

Based upon that hypothetical, do you have an opinion with a reasonable degree of medical certainty as to whether or not that boy was under the influence of a psychedelic drug, LSD, and potentiated by the marijuana?

(Continued on next page.)

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MR. WEITZ: I object only to those portions of the question that incorporates factual material that is at issue in this case. I don't object to the doctor's answering a hypothetical question. I don't want my silence to show that I have not --

THE COURT: There are a lot of statements made by counsel, hypothetical that you may or may not in your ultimate findings in this case assume to be true. You have to bear in mind if you don't find all those facts to be true this opinion that he's about to render may not have any validity.

If you don't find the facts to have existed as Mr. Gardner has posed.

THE WITNESS: Based on the situation you have just described I would say that everything very strongly suggests that this boy was in fact acting under the influence of LSD, potentiated by marijuana and go further, there is nothing in that entire loan story which is inconsistent, or makes me the least bit doubtful that this person was in fact under the influence of LSD during this time.

Q Do you have that opinion with a reasonable degres of medical certainty?

A With more than that, very definitely.

Q Would you please tell us, the members of the jury, what the basis of your opinion is; how you come to that opinion based on those facts?

A Anything really fits into the conclusion that this boy was acting in a very -- number one, very inappropriate way. From the story that has just been told it would seem that there would be no reason, there is certainly no apparent reason in this history for why the boy should not have stopped in the first place.

MR. WEITZ: I am going to object to that.

THE COURT: He is giving his opinion. It is nothing but an opinion and it shows how he arrives at his analysis, you may of course --

MR. WEITZ: It's not the law it's a factual opinion.

THE COURT: There is nothing to do with a legal question.

THE WITNESS: I am strictly addressing the behavior of this boy and whether it makes sense. When somebody is called to by a policeman and asked to stop there are two possible ways of responding, ordinarily.

MR. WEITZ: I am going to object.

THE COURT: It's a behavior pattern he is describing, there is umpteen ways people can respond.

MR. WEITZ: That is why I objected.

THE WITNESS: The normal behavior pattern would fall into one or two patterns, to run away as quickly as one could or to stop.

Strictly from the story the behavior of continuing to slowly walk which apparently within easy pursuit of the policeman it doesn't make any sense. It is not behaviorally what I would consider to be a normal response to that situation.

There is a number of instances in this story where the behavior of the boy seems to be without any goal, without any objective or purpose. Again, this is one of the hallmarks under the behavior, under the influence of LSD whether it's passive or violent, that there is no apparent purpose for it.

Four instances, one is the continuing to walk without trying to get away or stopping in response to the policeman's call. Secondly, the fact that when the boy apparently, according to the story, had the policeman down on the ground and he just held the policeman. Behaviorally it doesn't make sense what the objective of that would be. To continue simply holding the policeman while the policeman is apparently giving instructions to somebody else to call for

reinforcements, that is the type of behavior that you wouldn't consider normal. That is not what a normal person would do, to simply stay there and listen when the policeman you're holding down is giving instructions to somebody how to get on the radio and call for reinforcements.

One of the most apparent purposeless actions is to jump into a police car and race the motor leaving the car in neutral. That is bizarre behavior. There is one other general comment I would have on the behavior described, and that is the fluctuation. The change, apparently brought about change from docile, passive quiet behavior to very very violent behavior as described.

This along with the lack of purpose to the actions that a person under LSD has, this rapid changing from one extreme to the other, that is the other classical hallmark of the effects of LSD. So, based on the behavior as described plus -- let me just say from the behavior pattern without knowing anything else, I would conclude this boy was acting in a psychotic way with the added suggestion in the history that the boy had taken LSD and had smoked marijuana and then confirmed by the medical examination which

found laboratory evidence of both in the body, plus the added, the final fact of the quantity of LSD that was found in this boy's body, which is fully consistent with an amount that would produce the effect of LSD.

My conclusion without any question in my own mind is that this boy was acting under the influence of LSD according to the history that I was given.

Q And Doctor, do you have any opinion relevant to the amount of violence that was exhibited by this boy, withdrawn.

Could you tell us whether or not LSD creates any feelings of anxiety and what effect if any that might have upon a person's physical ability?

A LSD especially in somebody that has not repeatedly used it, it does produce anxiety. Any drug especially a drug that is reputed even among such drug culture, reputed to possibly be dangerous, any drug taken that a person is not familiar with causes anxiety, panic reaction. That again is a typical consequence of somebody that is under the influence of LSD. Panic which in no way is explainable in terms of the particular situation.

In other words, it's a panic action which just can't be explained. One of the classic features about LSD is that the environment in which the drug is taken is extremely

important in determining, or helping to pronounce the effect the drug will have. This, to some degree, is true even with a drug of alcohol if it's taken in one setting it has one effect, if taken in another alone rather than a group of friends, the environment has a definite influence.

With LSD this is even more true and when people take LSD in a home setting in which they're thoroughly familiar, with friends, relatives, whoever is around, people that they know and trust, people who are supportive and so on, it's in those circumstances that the so-called good trip is a pleasant sensation that go along with LSD according to those that take them are general experience.

In this case the environment was the exact opposite, It was apparently in a large open area apparently without friends around, apparently in a setting that was not familiar and certainly was not more than supportive. In those circumstances the likelihood of very very marked anxiety even to the point of an actual panic reaction is a very very high probability.

When people have tremendous anxiety the physical feats of which they are capable of, frequently they just deny imagination. When people are in a state of panic their bodies are capable of physical acts which under normal circumstances they simply would not be able to do.

MR. GARDNER: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. WEITZ:

Q Would it surprise you to know that there is no issue in this case that the boy took LSD?

A I --

Q There is no question if anything else, the 200 anograhms would be proof positive to you or anybody else to know he is acting under the influence of LSD.

A With the history, yes.

Q Certainly that history, as you said, was bizarre behavior, true?

A Yes.

Q That his behavior was if I wrote down what you said correctly, with objective, without purpose, senseless, made no sense. He was not really capable of purposeful action. Would that be another way of saying what you said?

MR. GARDNER: That is not an issue here either, what he did was purposeful or not is the question is what he physically did whether Mr. Haber did it intentionally or not is totally immaterial.

THE COURT: Step up here a moment.

(Whereupon, a side bar conference was held.)

BY MR. WEITZ:

Q When you gave us your qualifications earlier you mentioned teaching, you mentioned being with Public Health Service. Have you taught police about drugs and drug abuse?

A Yes. As a matter of fact, I was responsible for the training program in that case specifically with regard to narcotics busts in the police academy and correction officers in the entire department of corrections.

Q That is here in the city?

A Yes.

Q I think you live in Massapequa, isn't it?

A I live in Manhattan.

Q Doctor, have you ever taught or do you know if Nassau County has similar courses, similar to the one you taught?

A I imagine they do but personal knowledge I really don't know.

Q You teach police officers how to handle people who are on a bad trip?

A I would think it's appropriate to tell that to police officers.

Q How do you handle people that are on a trip?

MR. GARDNER: How does Dr. Newman?

Q How have you taught police officers to handle people that are on a bad trip; be supportive?

MR. GARDNER: I object.

THE COURT: It should be tied either to this Nassau County, or this policeman, I don't think -- I don't see the relevance.

Q What is the best way to handle somebody who is on a bad trip; from a layman's standpoint?

MR. GARDNER: Same objection, if your Honor please?

THE COURT: Bear in mind he is going to give you his doctor's opinion, not from a layman's standpoint, he is going to give you the doctor's opinion on how best -- unless it can be shown that this medical opinion has been transmitted to all those involved in this particular case, it merely is nothing more than an opinion on the abstract.

Q Would you answer that?

A Generally to be supportive to try and prevent a person, if a person is violent, from hurting himself and generally to try and get medical attention in terms of diagnosis and treatments of a person that appears to be under the influence of the drug.

Q Doctor, you told us of some of the mental effects

of LSD. There are physical effects of LSD too, aren't there?

A There are some, and they also vary.

Q But there are well known effects like tachycardia, isn't that so?

A Yes.

Q Tell the jury?

A It's a rapid heart beat with that effect, with many other physical effects. We really don't know if it's a direct effect of the drug itself, or a result of the mental state, that the drug produces a rapid heart beat is universal with any type of anxiety, so it's hard to say if that is a direct effect or indirectly.

Q Is it an effect of taking LSD?

A Yes.

Q You have testified in Court, have you not?

A Yes. I have.

Q You have testified before Mr. Gardner?

A No, sir. I haven't.

Q Have you been to his office?

A No, sir.

Q If you can't answer my question with a yes and no at this juncture, be good enough, tell me I'll try and rephrase them.

Doctor, I presume you have done some studying

before you got to be a doctor. You studied medicine before you got your degree?

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A Yes.

Q After you got your degree, subscribed to journals, read books, things like that?

A Yes.

Q There are standard basic textbooks on the chronological aspect of various medication, aren't there, Doctor?

A Yes.

Q One of them is the Physician's Desk Reference, isn't that so, Doctor?

MR. GARDNER: What?

MR. WEITZ: A standard reference book used by doctors.

THE WITNESS: Yes.

Q One of them is the Pharmacological?

A Yes, sir.

Q It's a recognized -- on pharmacologicaland drugs, isn't it, sir?

A Yes.

Q I'll ask you some questions from that recognized medical authority and would you just tell me whether you agree or disagree with what I am about to read to you from Page 195

of the Pharmacological Basis heading under drugs that induce psychadelic states and I'm skipping to Page 195 the other pharmacological effect of LSD are largely simpatominoletic, such as mydrisis. Increase in blood pressure, tachycardia, hyperreflexia, tremor, bilorex, muscular weakness, increased body temperature and an elevation of free fatty acids in the blood.

Do you agree with that, Doctor?

A I am aware of that -- I can't really answer that yes or no.

Q Do you disagree that these are pharmacological effects of LSD?

A I agree in general.

Q Do you agree that those are --

A Yes.

Q I'll continue.

Somatic symptoms -- before I read that sentence, tell us what somatic symptoms are?

A Bodily symptoms as opposed to mental symptoms.

Q Somatic symptoms such as dizziness, nausea, and parethesia also occur occasionally, do you agree with that, Doctor?

A Yes.

Q LSD causes an anti-diuretic effect and increases

the effect of creak?

A Yes.

Q You agree with that?

A Yes.

Q Let me go back to these other pharmacological effects, I'll wind up reading the whole thing to you.

What does the word sympatic mometic?

A There is two general nervous systems, I assume I can answer beyond yes and no?

Q Yes.

A There are two general nervous systems in the body. One is a voluntary nervous system which controls actual movement and the involuntary system which controls things we don't have under our own volition, under our own will such as sweating, such as secretion, dry mouth and so on.

The sympatic mometic responses are one type of response which is produced through the autonomic, or involuntary nervous system.

If the entire category of physical effects generally associated with fear, with anxiety and so on. These are sympato mometic effects, and these are, can be the result of LSD.

(Continued next page.)

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BY MR. WEITZ :

Q Now, among the words the effects listed is something called mydriasis?

A Mydriasis is the dilating or enlarging of the pupils, again typical effect when somebody is very very frightened.

Q Doctor, in this case there was testimony that this young boy's eyes didn't appear to be normal, or right, and he had a strange look on his eyes, would that be compatible with this mydriasis?

A I don't think so. It just means that the pupils are enlarged which you would get in any dark setting.

Q What is hyperreflexia?

A It means exactly what it sounds like. That a person will overreact to something that produces a reflex. Generally this is a technical term for reflexes that are listed by a physician in the course of examination. For instance, a tapping the knee and seeing the foot as a reflex bounce up. When somebody has hyperreflexia it means it bounces up even more than it would otherwise.

Q Skipping down, what I spoke to you about somatic symptoms, there is a phrase parethesia, what does that mean?

A An alteration in the sense, the feeling that

somebody has in the skin. It's a perception.

Q Now, Doctor, so that I want to make sure I read the whole thing and then ask you whether you agree or disagree with this entire section, last part of which I read to you, drugs that induce psychadelic states?

A Yes, I agree.

Q And when they talk about control over --

(Whereupon, an objection was made and argument ensued.)

MR. WEITZ: Can I ask him, Judge, this phrase in input, that is what the perception that a person has, the information coming into his brain, then being perceived and nunderstood by his brain, that is what input meant in that context?

THE WITNESS: Right.

Q Psychiatrists recognize these primary changes as a background state out of which a number of secondary psychological states can ensue, motive capacity, and circumstances, do you agree with that?

A Yes. I do.

Q Hoffman's description of the LSD experience was as follows, "My field of vision swayed before me and objects appear distorted, curved mirrors, I had the impression of being unable to move from the spot although my assistant told

me we had circled at a good pace. The following were the most outstanding symptoms. Vertigo, verbal disturbances, the faces of those around me looked like gross, of my condition in which state I sometimes observe in the manner of an interested neutral observer that I babbled incoherent. When I closed my eyes and unending series of colorful and fantastic images surged upon me."

MR. GARDNER: I'll concede that whoever that man was that sets forth what his personal experiences were when he took LSD, that he was -- that he experienced them. I see no purpose, I think this is wholly irrelevant, your Honor.

THE COURT: I suppose there is going to be another question following.

MR. GARDNER: Does he agree that this man wrote his experience?

THE COURT: He's asking what he has in there so far.

THE WITNESS: I'm afraid I can't answer it yes or no without giving a misleading response.

Q What I have read to you so far, has that described the kinds of experiences that have been described to you by users of LSD?

A Among others.

Q That is what I am getting at. It varies from person to person, doesn't it?

A Yes. It does.

Q You never had the opportunity to interview this young boy George Haber, did you, Doctor?

A No, sir. I didn't.

Q So when you talk about feats of strength in this case, are you relying, Doctor, on what was told to you by the lawyers in this case for the defense?

A No, sir. I am basing, I am not --

Q Are you relying upon Mr. Sellmeyer's version of the events?

A No, sir.

Q Well, Doctor, will you tell me on whose version of the events are you relying when you told this jury that this young man was capable of fantastic feats of strength?

MR. GARDNER: Objection to the form of the question, it assumes the Doctor was relying on a --

THE COURT: He gave his opinion as to what a person -- correct me if I am wrong, Doctor -- what a person under the influence of LSD might be capable of doing, not necessarily every person.

THE WITNESS: Absolutely, and has nothing to do with this specific boy. This is what is characteristic

when somebody has taken LSD and has anxiety and panic as a result.

THE COURT: It may or may not apply to this case?

THE WITNESS: Absolutely.

Q Just as these other pharmacological effects I have read to you may, or may not apply. You would have no way of knowing whether they did or didn't, sir?

A To this particular boy?

Q Yes.

A I personally would have no personal knowledge of whether it applies.

Q You have no way of knowing when he was resting his head on Mr. Sellmeyer's shoulders, and had his arms around Mr. Sellmeyer and when Mr. Sellmeyer said he felt tension when he moved, you wouldn't know if that was tension or tremors?

A From the description I couldn't tell.

Q By the way, marijuana, that produces some kind of alteration of consciousness, does it not, Doctor?

A It certainly can.

Q Produce uncoordination, uncoordination if that is a legitimate English word?

A It can do that also.

Q And this particular instance LSD in this case,

it was described as having been taken or having been seen in the young man's hand, we presume and don't dispute he probably ingested it. It was described as being a little blue pill like a saccharin pill. Is that the type of form that it comes in when it's pharmacologically produced as distinguished from somebody doing it in some basement laboratory somewhere, am I making myself clear to you?

A I really don't understand.

Q Are there places where it's used for medical research and it's manufactured, made for use by medical provisions in some form or the other, whether it may be licensed for use, is it licensed for use?

A Under very carefully controlled circumstances.

Q Is that the form that it's produced in when it's produced by such manufacturers?

A I really don't know, and I don't know if it's only one form that it is legally produced, there is probably many.

Q Doctor, I am not being facetious, I want to make it clear for the record. All your information is based upon, I think you told us, is based upon interviewe and observations as you said of those that take it, second-hand knowledge?

A I have never taken LSD.

Q Not even in an experimental setting?

A No setting whatsoever.

Q I think I am almost through.

MR. WEITZ: If I may just have a moment, your Honor.

I don't have anything else, your Honor. Thank you.

MR. GARDNER: Nothing else, Doctor. Thank you.

(Whereupon, the examination of Dr. Newman was concluded.)

(Whereupon, at this time a recess for the day was taken)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

MAX HABER, individually, and as Executor of the Goods, Chattels and Credits which were of GEORGE HABER, Deceased,

Plaintiff,

- against -

INDEX NO.
71 C 1408

THE COUNTY OF NASSAU and ROBERT SEHLMEYER,

Defendants.

----------x

UNITED STATES COURTHOUSE
Brookly, New York
May 11, 1976

B E F O R E:

HONORABLE THOMAS PLATT, U.S.D.J.

(CHARGE TO THE JURY)

HARRY RAPAPORT, C.S.R.
Acting Official Court Reporter

A P P E A R A N C E S:

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BARBARA P. BILLAUER, ESQ., of counsel,
Attorneys for the Defendants.

MORNING SESSION

(The following takes place out of the presence of the jury.)

THE COURT: Ladies and gentlemen, I have just one question which may sound surprising, and that is: Is the amount of funeral expenses $2,400?

MR. GARDNER: The total amount, your Honor?

THE COURT: The total amount. And I take it that's the only special with which we are concerned.

MR. GARDNER: $1,214, and the headstone was $815--no, $1,215.

MR. WEITZ: $2,429.

THE COURT: Let me make that correction. There is no medical?

MR. GARDNER: No medical.

THE COURT: Okay.

All right, put the sign up and we will get the jury out.

(The jury enters the courtroom at 9:45 A.M. and the following takes place in their presence.)

THE COURT: Good morning, ladies and gentlemen.

Now, I am about to give you the instructions on the law. Unfortunately for you, I have been making it a practice to read the instructions rather than to give them to you extemporaneously. In this case particularly I think it would be rather difficult to give you the instructions extemporaneously. The law is somewhat involved. And I think you will have to pay very close attention and follow various principles that are applicable to the different claims.

There are essentially three claims. And for simplicity's sake I will talk--I will break them down in terms of the first claim for violation of civil rights, the second claim for alleged wrongful death, and the fourth claim--or the third--we are talking about fourth claim because it's the fourth claim in the complaint--the fourth claim for alleged conscious pain and suffering.

Now I will discuss those separately and in roughly that order and they will crop up in various portions of the charge. But you will have to try to keep those three claims separately in your mind bearing in your mind that the first

claim for the alleged violation of civil rights is against Sergeant Sehlmeyer alone, and the other two claims are against Sergeant Sehlmeyer and the County of Nassau.

So much by way of background.

Now that you have heard the evidence and the arguments, the time has come to instruct you as to the law governing the case.

Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented

by the allegations of the complaint of the plaintiff, Max Haber, and the answer thereto of the defendants, the County of Nassau and Robert Sehlmeyer.

You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. The law is no respector of persons. All persons stand equal before the law and are to be dealt with as equals in a court of justice.

Now, the burden is on the plaintiff in a civil action, such as this, to prove every essential element of his case by a preponderance of the evidence. If the proof fails to establish any essential element of the plaintiff's case by

a preponderance of the evidence, then you should find for the defendants.

Similarly, on the question of contributory negligence about--which is involved in the second and fourth claims or causes of actions and about which I will say more to you later--the burden of proof by a preponderance of the evidence is on the defendants.

To establish by a preponderance of the evidence means to prove that something is likely--more likely than not so. In other words, a preponderance of evidence means such evidence as when considered and compared to that opposed to it, as more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

If from the evidence as a whole, including any evidence introduced by the defendants, you conclude under claim one that it is more probable that the defendant Sehlmeyer violated Section 1983 of Title 42 than he did not, or negligently caused the wrongful death of George Haber and pain and suffering under Claims 2 and 3, then you will find that the plaintiff has sustained his

burden of proof on Claims 1, 2 and 3. In other words, if the evidence on the issues are evenly balanced or does not establish what actually happened, then the party bearing the burden on the issue has not sustained his or their burden on the issue.

In determining whether any fact or issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence of who may have produced them.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

As a general rule the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury

find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as conclusively proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them, and all exhibits received in evidence regardless of who may have produced them and all the facts which may have been stipulated to and stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Anything you may have seen or heard out-

side the courtroom touching the merits of the case is not evidence and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. On the contrary, you are permitted to draw from facts which you find have been proved such reasonable inferences as seen justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from the established facts.

Presumptions are deductions or conclusions which the law requires the jury to make and prevail unless overcome or outweighed by evidence to the contrary.

The Rules of Evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. Witness who, by education and experience, have

become expert in some art, science, profession or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in the evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of the expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not found, you may reject the opinion entirely.

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

Ordinarily it is assumed that a witness will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances given under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail,

and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is knowingly done, if

done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

So much for general instructions at the moment. Now we will go to the first claim of the so called violation of civil rights claim.

Plaintiff in this case in his first claim or cause of action claims damages for the loss of his son alleged to have been suffered or sustained by him as the result of the deprivation, under color of the laws and ordinances of the County of Nassau, of a right, privilege and immunity secured to his son by the Constitution of the United States and by an Act of Congress.

Specifically, the plaintiff alleges that on or about September 29, 1972, the defendant Sehlmeyer was a Police Sergeant of the County of Nassau and while acting in his individual rather than in his official capacity, but under color of the laws and of the County of Nassau, state of New York, knowingly subjected the plaintiff's son to the deprivation of a right and privilege secured and protected to him by the Constitution and laws of the United States,

namely: The Constitutional right not to be deprived of life and liberty and without due process of law by shooting and killing plaintiff's said son without justification and with malice and with reckless and wanton and willful abandon; all to plaintiff's damage.

As indicated, plaintiff alleges that the acts of said defendant were maliciously and wantonly and oppressively done and by reason thereof the plaintiff further asks for an award of punitive and exemplary damages in addition to the actual or compensatory damages claimed by him.

Section 1983 of Title 42 of the United States Code provides that any inhabitant of this Federal District may seek redress in this court by way of damages against any person or persons who under color of law--under color of any law, statute, ordinance, regulation or custom, knowingly subject such inhabitant to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States.

The statute just outlined to you

compromises one of the Civil Rights Acts enacted by the Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment of the Constitution provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The defendant Sehlmeyer admits that on or about September 29, 1972, at the time and place alleged, his .32 caliber pistol went off and a bullet therefrom killed the plaintiff's son, but claims in such incident he acted in his official capacity as a Police Sergeant of the County of Nassau and pursuant to the laws and ordinances of said County and denies that any act or conduct of his deprived plaintiff's son of any right or privilege or immunities secured to him by the Constitution or laws of

the United States and denies that any act or conduct of his toward plaintiff's son was arbitrarily, maliciously, or oppressively done or was done with reckless, wanton or wilful abandon. And in this connection the defendant Sehlmeyer alleges that all of his acts and conduct of which plaintiff complained were done in good faith and in pursuance of his lawful authority and lawful duty as a Police Sergeant of the County of Nassau in connection with the investigation of an alleged crime or crimes and to prevent escape and generally to enforce the laws and regulations of the State of New York and the County of Nassau.

As to this first claim, regardless of your findings under reasonableness of the defendant Sehlmeyer's actions, if you find that the defendant Sehlmeyer acted in good faith, then you must find in favor of the defendant Sehlmeyer.

Good faith is defined as a subjective or personnl belief in the reasonableness of one's own actions. If you find that Sergeant Sehlmeyer reasonably believed his actions were

necessary and proper under the circumstances, as he interpreted them, then you must return a verdict in his favor.

In order to prove his claim the burden is on the plaintiff to establish by a preponderance of the evidence in the case the following facts:

One, that the defendant Sehlmeyer knowingly and without justification and arbitrarily or with malice or with reckless wanton and wilful abandon, did shoot and kill plaintiff's son as alleged;

Two, that defendant Sehlmeyer then and there acted under color of some law, ordinance or regulation of New York State or of Nassau County;

Three, that the said defendant's acts and conduct knowingly deprived the plaintiff's son of his Federal Constitutional Rights not to be denied or deprived of life or liberty without due process of law as that phrase is defined and explained in these instructions; and

Four, that said defendant's acts and

conduct were the proximate cause of the death of the plaintiff's son and consequent damage to the plaintiff.

The issues then to be determined by t jury in this case are these:

One, when the defendant Sehlmeyer attempted to stop and detain the plaintiff's son and applied force and did with respect to the plaintiff's son--and I should say allegedly applied force and did what he did with respect to the plaintiff's son while acting under the color of state law or county ordinances or some regulation issued by said authority, did said defendant do so without justification or arbitrarily or with malice or with reckless and wanton and wilful abandon.

If you're unanimous answer to this question number one is "No", the jury should return a verdict in favor of the said defendant; but if your unanimous answer is "Yes", then you have a second issue to determine, namely:

Two, did the plaintiff and his son suffer deprivation of life and liberty without due process of law, as that phrase is explained in

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these instructions by reason of such acts and conduct of said defendant?

If your unanimous answer to this question number two is, "No", the jury should return a verdict in favor of said defendant; but if your unanimous answer is "Yes", then the jury should return a verdict in favor of the plaintiff for such actual or compensatory damages as you find from a preponderance of the evidence in the case were proximately caused by any acts of said defendant which were so done.

If you find for the plaintiff and award him actual or compensatory or nominal damages, you must decide whether it appears from a preponderance of evidence in the case that the acts and conduct of the defendants toward the plaintiff's son at the time and place in question were maliciously, or wantonly, or oppressively done; and, if so, what amount, if any, of punitive and exemplary damages should be added to the award of actual or compensatory or nominal damages.

And I will give you further instructions with respect to what is meant by maliciously,

wantonly and oppressively and punitive damages a little later in the charge.

An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Acts are done under color of law of a County or State, not only when the County or State officials act within the bounds or limits of their lawful authority, but also when such officers act beyond the bounds of their lawful authority in the manner heretofore described. In order for such unlawful acts of an official to be done under color of law, however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist in an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful acts must be of such a nature, and must be committed under such circumstances, that they would not have occurred but for the fact that the person

committing them was an official, purporting to exercise his official powers.

As you will note, the Federal Statute, which the defendants are alleged to have violated, covers not only acts done by an official under color of any ordinance or regulation of any County or Municipality of the State, as well as acts done by an official under color of any regulation issued by any State or County or Municipal official, and even acts done by an official under color of some State or local custom.

So, the phrase, "under color of State Law" includes acts done under color of any State Law or County or Municipal ordinance, or any regulation issued thereunder, or any State or Local custom.

As stated before, the Fourteenth Amendment to the Federal Constitution provides that no State shall deprive any person of his life or liberty without due process of law. The "life" or "liberty" of the individual, which the Federal Constitution thus secures and protects, is not an absolute and unqualified

freedom or privilege to do as one pleases at all times and under all circumstances; but is always subject to reasonable restraints, including of course such restraints as are imposed by law.

The plaintiff in this case, in common with the defendant and all other persons living under the protection of our Constitution, had the legal right at all times not to be deprived, without due process of law, of his life or any liberty secured or protected to him by the Constitution or laws of the United States.

The plaintiff had, even though stopped or detained, liberties among which was the liberty to be free from unlawful attacks upon the physical integrity of his person. It has always been the policy of the law to protect the physical integrity of every person from unauthorized violation or interference. So, the plaintiff, even while stopped or detained had the right under the Federal Constitution not to be deprived of his liberty, involving the physical integrity of his person, without due process of law.

To be deprived of life or liberty without due process of law means to be deprived of liberty without the authority of the law. Before the jury can determine then whether or not the plaintiff was deprived by the defendant of his life or any of his liberty under the Federal Constitution without due process of law, the jury must first determine from a preponderance of the evidence in the case whether the defendant knowingly did the act alleged, and if so, whether under the circumstances shown by the evidence in the case, the defendant acted arbitrarily and without justification or with malice or with reckless and wanton and wilful abandon and thus without the bounds of his lawful authority under State Law.

For if the defendant acted in good faith or within the limits of his lawful authority under State Law, then the defendant could not have deprived the plaintiff of his life or any liberty without due process of law, since the Court finds and instructs you that the State and County Law and regulation applicable in this

case meet the requirements of the Federal Constitution.

As a Police Sergeant, the defendant had the lawful authority, indeed the lawful duty under State Law to investigate a crime and to prevent escape; to prevent one person from injuring another; generally and particularly to enforce and maintain the peace and good order.

The mere fact that the evidence in the case may establish physical contact between the defendant and the plaintiff's son which resulted in serious personal injury and death to the plaintiff is not proof that the defendant acted beyond his lawful authority under State Law.

The defendant had the lawful authority, indeed the lawful duty under State Law, to use such physical force as may have been reasonably necessary to investigate any crime, to prevent escape; to enforce compliance with proper instructions; and to protect other persons, and themselves as well, from physical harm at the hands of any person, including, of course, the

plaintiff.

So even though you should find from a preponderance of the evidence in the case that acts alleged by the plaintiff were in fact knowingly done by the defendant, if you also find that they were done for any one or more of the lawful purposes mentioned, such conduct of the defendant was not beyond the bounds of his lawful authority under State Law, and so was lawful, unless you further find from a preponderance of the evidence in the case that the defendant acted arbitrarily or with malice or with reckless and wanton and wilful abandon.

If you find from a preponderance of the evidence in the case that the defendant did not act within the limits of his lawful authority as described, but acted beyond the bounds of his lawful authority as so described at the time and place alleged, then you must find that the defendant did without due process of law deprive the plaintiff of life and liberty secured and protected to him by the Constitution and laws of the United States, and you will return a verdict for the plaintiff.

If, however, you do not find from a preponderance of the evidence in the case that the defendant acted without the bounds of his lawful authority as so described, or if you find that he acted in good faith at the time and place alleged, then the jury should return a verdict in favor of the defendant, because as previously stated, unless the defendant acted outside the limits of his lawful authority as so described, or in bad faith, then the defendant did not deprive the plaintiff of any liberty, life or liberty, without due process of law, and you will return a verdict for the defendant.

This brings us to the second part of the Civil Rights Claim, namely, the question of damages which you will consider only if you find for the plaintiff on the basis of all of the foregoing.

The fact that I instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to prevail in this case. And again, you should consider such instructions

only if you find from the evidence in favor of the plaintiff.

Under this first cause of action, or claim, plaintiff seeks both actual and punitive damages.

If plaintiff is entitled to recover his actual damages--I'm sorry, is entitled to recover, his actual damages will be the aggregate of damages computed in accordance with the basic instructions which I will give you pertaining to the second and fourth causes of action, or claims, i.e., the aggregate of damages for alleged wrongful death and for claimed conscious pain and suffering in connection with the alleged shooting of the plaintiff's son. I will give you such basic instructions with respect thereto when I discuss those particular claims.

With respect to plaintiff's claim punitive damages, if you find plaintiff to be entitled to any of such, then the instructions are as follows:

In addition to actual damages, the law permits the jury, under certain circumstances,

to award the injured person punitive and exemplary damages in order to punish a wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the defendant, which proximately caused actual injury or damage to the plaintiff was maliciously or wantonly or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is maliciously done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is wantonly

done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is oppressively done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages in addition to actual damages is a matter exclusively within the province of the jury if the jury should unanimously find from a preponderance of the evidence in the case that the defendant's act or omission, which proximately caused actual damage to the plaintiff was maliciously or wantonly oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the conditions

under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded or fixed in amount because of any sympathy, or bias, or prejudice with respect to any party to the case.

This then brings us to the second and fourth claims made by the plaintiff. In the second claim, plaintiff seeks to recover damages for an alleged wrongful death of his son, and in the fourth claim for alleged conscious pain and suffering, for both the alleged shooting and for the alleged beating of the plaintiff's son.

The issues to be determined by you in this case are these:

Were the defendants negligent?

If your answer to that question is "No", you will return a verdict for the defendants. But if your answer is, "Yes", you will then have a second issue to determine, namely, was the negligence of the defendants a proximate cause

of any injury to the plaintiff's son?

If your answer to that question is "No", you will return a verdict for the defendants. But if your answer is "Yes", then you should find the answer to a third question, namely, was the pla...iff's son contributorily negligent?

If you find that he was not, having found in the plaintiff's favor in answer to the first two questions, you should determine the amount of the plaintiff's damages and return a verdict in the plaintiff's favor for that amount.

On the other hand, if you find that the plaintiff's son was contributorily negligent and that such fault contributed as a proximate cause of any injuries which plaintiff's son may have sustained, you will return a verdict for the defendants.

In this case the plaintiff seeks to recover damages for alleged conscious pain and suffering in the fourth cause of action and alleged wrongful death in the second cause of action.

Plaintiff has the burden of proving by a fair preponderance of the evidence:

One, that the defendants were negligent;

and

Two, that the defendants' negligence was the proximate cause, if any, of the accident.

If on consideration of all the evidence you find that the plaintiff has not sustained his burden on each of the two issues referred to, then your verdict will be for the defendants--I should say, on either of the two issues referred to, then your verdict would be for the defendants.

If, however, you find that plaintiff has sustained his burden of proof on both of such issues, then you must consider whether the defendants have sustained their burden of proof by a preponderance of the evidence of:

First, that plaintiff's son was negligent; and, second, that such negligence contributed to the accident.

If on consideration of all the evidence you find the defendants have not sustained their burden of each of the two issues referred to, then your verdict will be for the plaintiff.

If, however, you find that the defendants have sustained their burden of proof on both of such issues, then your verdict will be for the defendants.

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property.

Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property, or the persons or property of others.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case.

Because the amount of care exercised by a reasonably prudent person varies in proportion of the danger known to be invalid in what is being done, it follows that the amount of caution

required in the use of ordinary care will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence in the case.

To put it in another way, as the danger that should reasonably be foreseen increases, so the amount of care required by law also increases.

The mere fact that an accident happened standing alone does not, unless otherwise expressly stated, permit the jury to draw the inference then the accident was caused by anyone's negligence.

Now, an injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the damage, and that the damage was either the direct result or a reasonably probable consequence of the act or omission.

An employer, such as the County of Nassau, is not responsible for the act of his employee, unless the act is in furtherance of the employer's

business and within the scope of the employee's authority. An act is within the scope of an employee's authority if it is performed while he is engaged generally in the business of his employer to which he was assigned, or if his act may be reasonably said to be necessary or incidental to such employment. The employer need not have authorized the specific act in question. If you find that Sergeant Sehlmeyer within the scope of his authority and in furtherance of the Nassau County Police Department business negligently caused injury to the plaintiff, you will hold Nassau County responsible for such act provided, of course, there is fulfillment to all the other instructions I have given you.

Even though you find that the employer specifically instructed the employee not to perform the act in question, if you find that the act was done in furtherance of the employer's business, you may find that it was within the scope of the employee's authority.

Even though you find that the employee's act was reckless or wilful, the employer is

nonetheless responsible for the act if you find that it was performed in furtherance of the employer's business and within the scope of his authority.

Now, as to the second and fourth cause of action, a police officer, when in the process of carrying out his duties, may use physical force where he reasonably believes either his own life or the lives of those he is responsible to protect are in danger or that there is danger of physical injury.

The law holds that there is legal justification to use force in situations where the police officer reasonably believes that lives are in danger, or bodily harm is imminent, including his own.

Where the escape of the suspect is imminent or to effectuate a lawful arrest, the law also justifies the use of reasonable force.

If you find that the plaintiff became violent and dangerous while under the custody of Sergeant Schlmeyer and that the defendant was either put in peril of his life or threatened with bodily harm, or that the defendant

reasonably believed that the public was threatened with bodily harm or threat to life, then the law justifies the defendant's use of force.

If you find that Sergeant Sehlmeyer used reasonable force under the circumstances, then you must return a verdict in favor of the defendants.

If you find that Sergeant Sehlmeyer was in the process of lawfully arresting the plaintiff or preventing his escape, then the law allows the use of force, reasonable force.

If you find that Sergeant Sehlmeyer reasonably used force under the circumstances, then your verdict may be for the defendants.

Now, Section 35.30 of the Penal Law provides--of the State of New York provides that a peace officer in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent that he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody or

to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, except that he may use deadly physical force for such purposes only when he reasonably believes that regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

The definition of deadly physical force in the Penal Law means deadly physical force--means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

A deadly weapon is defined as any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, dagger, billy, blackjack, or metal knuckles.

But if you find from the preponderance of

the evidence in the case that the defendant Schlmeyer by some act or failure to act violated the provisions of such section of the Penal Law, such conduct in violation of the law is presumed negligent.

This presumption of negligence is not, however, conclusive, but may be overcome or outweighed by evidence in the case which satisfies your minds that, notwithstanding any failure to comply with the provisions of the Penal Law in question, the defendant acted as a reasonably prudent person would have acted under all the surrounding circumstances in the case.

And you will bear in mind, of course, that a finding of negligence based upon a violation of law by a defendant will not justify a verdict in favor of the plaintiff unless the violation of law was a proximate cause of an injury or damage found by you to have been suffered by the plaintiff's decedent son.

In addition to denying that any negligence of the defendants proximately caused any injury or damage to the plaintiff, the defendants allege as an affirmative defense that some

contributory negligence on the part of the plaintiff's son himself was the proximate cause of any injuries and resulting damages that may have been sustained.

Contributory negligence is fault on the part of a person injured, which contributes in some degree with the negligence of another and so helps to bring about the injury.

By the defense of contributory negligence the defendant alleges that even though a defendant may have been guilty of some negligent act or omission which was one of the proximate causes, the plaintiff's son himself, by his own failure to use ordinary care under the circumstances for his own safety at the time and place in question also contributed to one of the proximate causes of any injuries and damages plaintiff may have suffered.

The plaintiff's son was required to exercise reasonable care for his own safety; that is, the same degree of care that a reasonable person would have exercised for his own safety under the circumstances.

The law does not permit you to weigh the

degree of fault of plaintiff's son or defendants, but requires that if you find the plaintiff's son was guilty of any negligence which proximately caused his death or injuries, your verdict must be for the defendants, even though you also find that the defendants were negligent.

In regard to the plaintiff's son, it is not important whether the negligence is great. But in regard to the plaintiff's son's negligence, it is not important whether the negligence is great or slight. Any failure to live up to the required standard is contributory negligence and shall entirely bar the plaintiff from recovery.

It is not the degree of contributory negligence that is important.

If you find then that George Haber's own acts contributed to his death and that he did not act as a reasonable man in exercising care for his own safety, then you must stop all deliberations and return a verdict in favor of the defendants.

Since everyone is required to act with

knowledge of what the law forbids and what the law requires to be done, the provisions of law set forth in the statute that are to be read to you are to be considered by the jury as one of the circumstances in evidence in the case surrounding the conduct of the plaintiff's son.

The defendant alleges that at the time and place in question plaintiff's son was guilty of contributory negligence in the following particulars, i.e.a violation of one or more of the following statutes:

Section 110.00 of the Penal Law provides that a person is guilty of an attempt to commit a crime when with intent to commit a crime he engages in conduct which tends to effect the commission of such crime.

Section 130.55 of the Penal Law provides that a person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent, except that in any prosecution under this section it is an affirmative defense that (a) such other person's lack of consent was due solely to incapacity to consent by reason of

being less than seventeen years old, and (b) such other person was more than fourteen years old, and (c) the defendant was less than five years older than such other person.

Sexual abuse in the third degree is a class B misdemeanor.

Section 120.20 of the Penal Law provides that a person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Reckless endangerment in the second degree is a Class A misdemeanor.

Section 120.15 of the Penal Law provides that a person is guilty of menacing when by physical force he intentionally places or attempts to place another person in fear of imminent serious physical injury.

Menacing is a Class B misdemeanor.

Section 120.00 of the Penal Law provides that a person is guilty of assault in the third degree when:

One, with intent to cause physical injury to another person he causes such injury to such

person or to a third person; or

Two, he recklessly causes physical injury to another person.

Assault in the third degree is a Class A misdemeanor.

Section 120.05 of the Penal Law provides that a person is guilty of assault in the second degree when with intent to cause serious physical injury to another person he causes such injury to such person or to a third person. In the course of and in furtherance of the commission of a felony, other than a felony defined in Article 130, or of immediate flight therefrom, he or another participant, if there be any, causes physical injury to a person other than one of the participants.

Assault in the second degree is a Class D felony.

Section 205.10 of the Penal Law provides that a person is guilty of escape in the second degree when having been arrested for, charged with or convicted of a felony, he escapes from custody.

Escape in the second degree is a Class E

felony.

Section 205.05 of the Penal Law provides that a person is guilty of escape in the third degree when he escapes from custody.

Escape in the third degree is a Class A misdemeanor.

Section 160.15 provides that a person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

One, causes serious physical injury to any person who is not a participant in the crime; or

Two, uses or threatens the immediate use of a dangerous instrument.

Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

Robbery in the first degree is a Class B felony.

Section 240.25 of the Penal Law provides that a person is guilty of harassment when with intent to harass, annoy or harm another person,

One, he strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or

Two, in a public place he uses abusive or obscene language, or makes an obscene gesture; or

Three, he follows a person in or about a public place or places; or

He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment is a violation.

Section 220.00 of the Penal Law provides:

One, hallucinogenic drug means any drug, article or substance declared to be hallucinogenic drugs in Section 229 of the Mental Hygiene Law.

Section two defines dangerous drug as any narcotic drug, depressant or stimulant

drug, or hallucinogenic drug.

Section 220.05 of the Penal Law provides that a person is guilty of criminal possession of a dangerous drug in the fourth degree when he knowingly and unlawfully possesses a dangerous drug.

Criminal possession of a dangerous drug in the fourth degree is a Class A misdemeanor.

Additionally, the plaintiff was contributorily negligent in failing to exercise reasonable care for his own safety.

If you find from a preponderance of the evidence in the case that the plaintiff's decedent by some act or failure to act violated the provisions of one or more of the foregoing provisions of the law or statutes which I just read to you, such conduct and violation of the law is presumed negligent. This presumption of negligence is not, however, conclusive, but may be overcome or outweighed by evidence in the case which satisfies your minds that, notwithstanding any failure to comply with the provisions of law in question, the plaintiff's decedent acted as a reasonably prudent person

would have acted under all the surrounding circumstances shown by the evidence in the case.

And you will bear in mind, of course, that a finding of negligence--in this case a finding of contributory negligence, based upon a violation of law by the plaintiff's decedent will not justify a verdict in favor of the defendants unless the violation of law was a proximate cause of an injury or damage found by him to have been suffered by the plaintiff's son.

And an injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in working about or actually caused the injury or damage and the injury or damage was either a direct result or a reasonable probable consequence of the act or omission.

Now, so much for the substantive law on the second cause.

And again, the fact that I go on to damages is not to be taken by you as any intimation that I have any view as to which

party should prevail here. That determination must be made by you and you alone and that determination must first be made by you unless you first come to any consideration or question of damages.

Now, with respect to the second and fourth causes of action, plaintiff alleges in two separate claims, the first to recover damages for the claimed wrongful death of the decedent, and the second to recover damages which allegedly accrued prior to the death , namely, with respect to his alleged conscious pain and suffering from the alleged shooting and the alleged beating.

You will recall as to the first or Civil Rights Claim, plaintiff's damages, if any, were for the claimed wrongful death and for pain and suffering from the alleged shooting.

You must render a separate verdict on each of these three causes of action. The first, of course, it is somewhat alone, and the fourth and second against Schlmeyer and the County of Nassau.

Now, with respect to the fourth cause of

action for damages which allegedly accrued prior to decedent's death, the plaintiff is entitled to recover such sum as you find will fairly and justly compensate for the pain and suffering actually endured by decedent during such time as he was conscious from the moment he was injured to the moment of his death. The total thus fixed by you for conscious pain and suffering will constitute your verdict on the first cause of action if you find for the plaintiff on this cause of action.

If, of course, you find that the decedent was never conscious from the moment he was injured to the moment of his death, then plaintiff is entitled to recover nothing on this cause of action or claim and you should so state in your verdict.

With respect to the second cause of action or claim by the plaintiff the measure of damages is limited to be such a sum as to the jury is a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the parents of the decedent.

I will reread that. It is limited to be

such a sum as to the jury is a fair and just compensation for the pecuniary loss resulting from the decedent's death to the parents of the decedent.

Since the statute limits recovery to pecuniary loss or injury, you may not consider or make any award for sorrow, mental anguish or injury to feeling or loss of companionship. You must appraise in an impartial manner to the best of your ability the pecuniary or money value of decedent to his parents on the day he died.

In reaching that value you should take into consideration decedent's character, habits and ability; the circumstances and conditions of his parents; his services, if any, he were to perform for his parents had he continued to live; the proportion of his earnings that he would in the future would have applied to the care and support of his parents; decedent's age and life expectancy and each of his parents' ages and life expectancy.

The evidence was that the decedent was at the time of his death eighteen years of age and

according to the mortality tables had a life expectancy of 32 years and that his father was then 54 years of age and had a life expectancy of 21 years, and his mother was then 51 years of age and had a life expectancy of 28 years.

Mortality or life expectancy tables are, of course, nothing more than statistical averages. They neither assure the life spans that I have given nor assure decedent's life span might not have been or that his parents will not be greater. The figures I have given you are not binding upon you, but may be considered by you together with the evidence you have heard concerning the health, habits, employment and activities of the decedent prior to his death and of his parents in determining what the life expectancies were at the time he died.

What portion of decedent's earnings, if any, he would in the future have applied to the care and support of his parents, you will determine from the amount he earned per year prior to his death, the portion of those earnings which he contributed to their support and the pattern of those contributions, his position

with his employer at the time of his death, his prospects for advancement and the probabilities with respect to his future earnings, the hazards of any occupation, the condition of his health, and the length of time he would reasonably be expected to continue working.

In determining what portion of his earnings decedent would have supplied in the future to the care and support of his parents, you should consider that the decedent was not completely obligated to contribute to the support of his parents, but you may, if on evidence you deem it reasonably probable that decedent would have contributed to the support of either or both of them, take his earnings into consideration in this respect.

As I have stated, it is the pecuniary value of the decedent to his parents you must fix. That value is incapable of exact proof since it is prospective and contingent. In considering all of the elements to which I have referred to, you must exercise your common sense and sound judgment in fixing the amount of the pecuniary injuries suffered by decedent's parents. To the sum thus determined you will

add the reasonable funeral expenses of $2,429. The total thus ascertained by you will constitute your verdict on the second cause of action or claim if you find for the plaintiff.

Bear in mind that a lump sum received today is worth more than the same total amount paid in installments over a period of time because the lump sum received today can be invested and will earn interest. Any award you make must be made now, though the earnings from which the decedent would have contributed each year to the support of his parents must be reduced to present cash value in order to make allowance for the earning power of money. Present cash value you will fix by ascertaining the rate of interest which is really to be expected from reasonably safe investments by a person of ordinary prudence but who does not have particular financial skill or experience and on the basis of that rate deducting a reasonable allowance for the earning power of money from the amount fixed by you as what decedent would have contributed to the support of his parents.

Damages must be reasonable. In the event

that your verdict is for the plaintiff you may award him only reasonable damages.

You are not permitted to award wholy speculative damages which ar wholy remote or conjectural.

You are not to access damages for any injury or condition from which the plaintiff's son may have suffered, unless it has been established by a preponderance of the evidence that such injury or condition was proximately caused by the accident in question.

Except as indicated in the first cause of action here, you may not include in or add to an otherwise just award any sum for the purpose of punishing the defendants or to set an example. The law does not permit punitive damages, nor does the law permit the payment of court costs or attorney's fees except as I have indicated heretofore with respect to the first claim in the cause of action.

Again, the fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to prevail

in this case. Instructions as to the measure of damages are given for your guidance in the event you find from the evidence in favor of the plaintiff.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violent to individual judgment.

Each of you must decide the case for yourselves, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges,

judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony or for other purposes. Do not assume that I hold any opinion on the matters to which my questions were related. Remember, at all times, that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

It is the duty of the Court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure. You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

It is the duty of the attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the Court sustained an objection to

a question, the jury are to disregard the question and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence.

As stated before, the jurors are the sole judges of the credibility of the witnesses and the weight and effect of all evidence.

If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the assertion as evidence of that fact. The lawyer's statements are not evidence.

Upon retiring to the jury room your foreman will be the person seated in the first row nearest to me. The foreman will preside over your deliberations and be your spokesman in court.

If it becomes necessary during your deliberations to communicate to the Court, you

may send a note by one of the deputy marshals, signed by your foreman. Never attempt to communicate with the Court by any means other than a signed writing.

I may say, you may send a note by your foreman or one or more of the jurors. Never attempt to communicate with the Court by any means other than a signed writing. And bear in mind you are not to reveal to the Court or to any person how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

Now, I am not going to send the exhibits with you as you retire. I am going to suggest you begin your deliberations without them. If you want one or more or all of the exhibits, all you need to do is send a note to me requesting one or more or all of them.

If you wish testimony reread, you may have it; but only after you have spent some period of time deliberating towards reaching a verdict.

I say that because like the instructions, you should attempt to view the evidence as

a whole and reach your verdict on evidence as a whole. If you start reading back one or more portions of the testimony, you may put perhaps undue weight on that testimony which has been just reread. And I don't believe-- we really don't have the time to reread the whole case to you.

So we will take a five minute recess, during which time I will discuss various questions of law with the attorneys, and during which time you are not to discuss the case, nor are you in any way to begin your deliberations. After which you will be recalled and I will give you any additional instructions which are necessary.

The alternates will be discharged and then you will begin and not before.

Don't discuss the case.

(The jury leaves the courtroom at 10:46 A.M.)

(The following takes place out of the presence of the jury.)

THE COURT: I have had criminal case charges that are longer. I don't think I have

had civil case charges that are longer.

MR. WEITZ: Should I make my objections and requests at this point?

THE COURT: I think you better.

MR. WEITZ: Okay.

I do not believe the Court instructed the jury that--this is according to my notes--that the defendant with respect to the first claim has the burden of proof on the question of good faith. And I would request they be so instructed.

THE COURT: I wrestled with that. I think that was the law prior to Paul v. Davis. I think with the advent of Paul v. Davis it is no longer the law.

MR. WEITZ: Whatever your Honor says.

THE COURT: What is your view on that subject, Mr. Gardner?

MR. GARDNER: I concur with your Honor on that.

THE COURT: You may bear in mind, you may concur with reversible error on that case.

MR. GARDNER: I don't think so, your Honor.

I think that Paul v. Davis is pretty

solid on that issue and I don't think we should charge that.

THE COURT: I think it was the law in the days of Laverne v. Corning (phonetic spelling), but I don't think it's the law now.

MR. WEITZ: I have my objection, your Honor.

THE COURT: Yes.

MR. WEITZ: If your Honor please, I know the Court instructed the jury on the violation of Statutes, but I had requested, I believe--and if I have not, I would make the request now--that the jury be instructed that the violation--any violation of a Police Department regulation is some evidence of negligence.

I did make a request that the Police Department regulations be incorporated in the charge. I thought the Court was going to do that. Apparently the Court decided in its wisdom it would not.

THE COURT: I read the Penal Law and it seemed to me that overruled the regulations that governed here, and that's the reason I gave the Penal Law and I gave them if they

found a violation of the Penal Law, what is it, 350.05, then that is not just some evidence, but it presumed negligence and I thought that was the proper charge.

MR. WEITZ: I understand your Honor's thinking, but I think I am entitled to this in addition.

THE COURT: Not where there is a possible conflict.

MR. WEITZ: Again, with respect to the regulations, your Honor, one of the regulations provided extraordinary care must be used with figarus. And where a defendant has by regulation promulgated a higher standard of care, I think I am entitled to a charge that a violation of that standard of care by the defendant's own regulations is evidence of negligence.

And again, this is another part of this same request on regulations.

THE COURT: I gave the quantum rule insofar as increasing danger and I think that is all I propose to do.

MR. WEITZ: Yes. I heard that, Judge.

I would also take exception to your Honor's lump sum award charge. I believe that such a charge--and I don't saythe Court did not do this--is limited to the laws of earnings part of any claim.

THE COURT: Yes. No question about it. That's what it pertains to.

MR. WEITZ: I don't believe the Court's instruction to the jury as I heard it, that it was made specifically clear to them that the reduction to a lump sum does not apply to any other aspect of the pecuniary loss, but only to the loss of earning loss.

THE COURT: The second cause of action alone was the portion pertained to that and I predicated that part of the charge with the instructions.

MR. WEITZ: If I may have an objection to the direction of the jury, if your Honor please, that the exhibits will not be sent into them, but they will have to request specific exhibits.

I have nothing else.

THE COURT: Of course, if youboth want

to send all the exhibits in, fine. I think the proper way is to let them deliberate initially without exhibits.

MR. GARDNER: I have one request, your Honor, and apparently your Honor skipped over it on Page 18 of requests to charge, where I would ask your Honor to charge Section 229, renumbered 449 of the Mental Health Law, in view of what your Honor read what the hallucinagenic drug was pursuant to---

THE COURT: Yes, I don't know why I missed that, yes.

MR. GARDNER: I am sure it was just an oversight.

THE COURT: It was.

MR. WEITZ: To make sure I preserve my record on this, I object to any instructions on these statutes about defining for them the elements of each crime.

THE COURT: No, I have covered that and I overlooked one thing.

MR. WEITZ: Thank you very much.

I except.

THE COURT: Yes.

MR. WEITZ: Thank you very much.

MR. GARDNER: Page 15, your Honor.

THE COURT: All right.

(The jury enters the courtroom at 10:50 A.M.)

THE COURT: Counsel pointed out to me that in reading to you the definition of dangerous drugs I said that in the statute hallucinogenic drug means a drug declared to be such in Section 229 of the Mental Hygiene Law, but I neglected to point out to you that such section of the Mental Health Law includes LSD and it's definition of hallucinogenic drugs.

With that additional instruction I think we can let our alternate jurors go with the thanks of the Court for your attention over the last two weeks. Fortunately or unfortunately, I am not quite sure which it is in the alternate juror's minds, you don't have to go on from here. You do go with the thanks of the Court for your attention of the case.

If you have anything in the jury room you should pick it up and check out in the central jury part downstairs. I don't know if

they have any additional duties for them or not. I think your term is probably up. They will tell you.

Thank you very much.

The other jurors wait right here for a moment.

(The alternate jurors exit the courtroom.)

THE COURT: Would you swear in the marshal, please.

(The marshal is sworn.)

THE COURT: Now, ladies and gentlemen, the procedure will be roughly as follows:

If you have not reached a verdict say before around 12:15, I will have a--I will have a marshal knock on your door and bring you in appropriate forms for lunch orders. And I will let--and it takes about that amount of time before 1:00 o'clock for the lunch to arrive. And I will let the attorneys go to lunch between 1:00 and 2:00.

I tell you all that because if you start building up any question you want to ask or what have you, you should certainly get them to us before 1:00 o'clock before the attorneys

go because they must be here to hear any question you ask, and so forth.

I am not suggesting for you to take longer or shorter. I just give you the general routine of the court.

Now you may discuss the case.

(The jury leaves the courtroom for the purposes of commencing their deliberations at 11:55 A.M.)

(Court is adjourned awaiting word from the jury.)

(The time is 12:30 P.M. and the court is reconvened without the presence of the jury.)

THE COURT: I have a note which I will ask the Clerk to mark Exhibit 1.

THE CLERK: So marked.

THE COURT: The jury must think we are dealing with a criminal case because they are asking for statements of the three charges restated in the layman's language. And I think I have to educate them in that extent, that we are dealing with a complaint.

MR. GARDNER: I don't think we are talking about charges, that that is the confusion. I

think they just did not understand the formality of the language that the claim is made in.

THE COURT: I don't know. I certainly didn't intend to convey the impression that we are dealing with charges.

And they also want copies of the statements made by Alan Loeffler and Donna Nelson, if they are in evidence.

MR. WEITZ: The statement of Nelson is not in evidence.

THE COURT: Was it read?

MR. GARDNER: She was cross-examined from it on my cross-examination.

THE COURT: It was never put in evidence?

MR. GARDNER: No, not in toti, but there were certain portions read to her.

THE COURT: I will say it's not in evidence, but they can have that portion of her testimony read, if they must.

MR. WEITZ: I will object to that.

THE COURT: I will say it was only used in cross-examination. But I am not going to encourage them to have it reread.

MR. GARDNER: I think what they are really

asking for is what the statement said. And it is in evidence to the extent that it was used in cross-examination. And she indicated her--the truth of what was contained therein.

THE COURT: I don't know how to state something as complex as this in layman's language.

I think the only thing to do is to reread the plaintiff's contention or claim and the defendant's defense, if they want them both read, or just the plaintiff's claim, what I read in the first part of the charge.

And as far as the second part, the second claim, I will just read them the issues to be determined by them, was the defendant negligent, if your answer to the question is yes, and so forth. I don't know how else to do it.

MR. WEITZ: I have no idea, your Honor--sorry I didn't rise.

I have no idea.

THE COURT: You can't read them the complaint because the complaint was amended and there was never a formal amendment to it. The first claim was amended in substantial respects.

The only thing we can do is point out the issues to them rather than try to read to them the charges.

I think that's the only thing to do.

MR. GARDNER: I think you have to explain the issues to them. That's what they are looking for.

MR. WEITZ: I don't know what they are looking for, Judge. The question is so--that's what happens when they send in notes.

THE COURT: Let me do the best I can.

(The jury enters the courtroom at 12:44 P.M. and the following takes place in the presence of the jury.)

THE COURT: Now, ladies and gentlemen, I have your note and I will take it up in reverse order because it's probably easier that way.

Alan Loeffler's statement was marked into evidence and you may have it, assuming that's the one you want, Alan Loeffler.

Donna Nelson's statement was not marked in evidence. It was used on her cross-examination by Mr. Gardner, but was never marked into evidence. So that answers question number two.

Now, on question number one, the original complaint which I read to you before you were selected as jurors, I read provisions of it to you to give you an idea of what was involved.

This--I read it when the jury was as a whole It was not to give you the precise nature of the issues with which you were going to be confronted with when you reached the conclusion of the trial, for the reason that there were a number of amendments made to the complaint verbally with the consent of the Court, none of which have been precisely reduced to writing, except insofar as I have reduced them to writing in the charge I have given to you.

Now, there are three different claims or causes of action in this complaint. And I started my charge this morning, as I recall, in saying to you that you can put them in three broad sort of categories. The first against Sergeant Sehlmeyer alone was for knowingly subjecting plaintiff's son to the deprivation of a right and privilege secured to him by the Constitution and laws of the United States, namely, the constitutional right not to be

deprived of life and liberty without due process of law by shooting and killing plaintiff's said son without justification and with malice and with reckless and wanton and wilful abandon.

The second cause or claim was against both the County of Nassau and the defendant Sehlmeyer for what is generally known as the statutory--the New York State statutory right to recover for wrongful death. And that is based on negligence.

And the third claim, or we refer to it as the fourth cause of action or claim, was based upon the prior to death alleged conscious pain and suffering of the plaintiff's son, which had also predicated on such alleged evidence of the County of Nassau and Robert Sehlmeyer.

Now, these, all three of these claims, the first against Sehlmeyer, the second and fourth against both defendants, are technical in nature. And I hesitate to do anything less than reread to you the issues with which you are confronted in determining these crimes. Because without the issues the plaintiff's contention and the defendant's contention in effect, I am

not so sure that you can fully appreciate what you're confronted with. I realize that those issues are framed in legal terms, but we are stuck with them to some extent because reviewing courts require that you be instructed in this type of language.

I will read the plaintiff's contention and the defendant's contention as to the first claim and slowly. And maybe you can follow it.

Plaintiff in this case in the first claim or cause of action claims damages for the loss of his son alleged to have been suffered or sustained by him as a result of the deprivation, under color of the laws and ordinances of the County of Nassau, of a right, privilege and immunity secured to his son by the Constitution of the United States and by an Act of Congress. Specifically, the plaintiff alleges that on or about September 29, 1972, the defendant Schlueyer was a police sergeant of the County of Nassau and that while acting in his individual rather than his official capacity, but under the color of the laws of the County of Nassau and the State of New York, knowingly--

as I have defined that term and I will redefine that term--knowingly subjected the plaintiff's son to the deprivation of a right and privilege secured and protected to him by the Constitution and laws of the United States, namely, the constitutional right not to be deprived of life and liberty without due process of law by shooting and killing plaintiff's son without justification and with malice and with reckless and wanton and wilful abandon; all to the plaintiff's damage.

The defendant Sehlmeyer admits that on or about September 29, 1972, at the time and place involved, his .32 caliber pistol went off and a bullet therefrom killed the plaintiff's son, but claims that in such incident he acted in his official capacity as a police sergeant of the County of Nassau and pursuant to the laws and ordinances of said County and denies that any act or conduct of his deprived plaintiff's son of any right or privilege or immunities secured to him by the Constitution and the laws of the United States and denies that any act or conduct of his toward plaintiff's son was

arbitrarily, maliciously or oppressively done or done with reckless, wanton or wilful abandon. And in this connection the defendant Sehlmeyer alleges that all his acts and conduct of which plaintiff complained were done in good faith in pursuance of his lawful authority and lawful duty as a police sergeant of the County of Nassau in connection with the investigation of an alleged crime and to prevent escape and generally to enforce the laws and regulations of the State of New York and the County of Nassau.

Now, that's as to the first claim.

As to the second claim--and really as to the second and fourth claim because they are predicated on negligence, on the negligence and contributory negligence question, negligence as the plaintiff alleges, that the defendants were negligent; and the defendant alleges, the defendants allege the plaintiff was contributorily negligent. And he says if they were contributorily negligent under New York law--and that's true--and we are dealing with New York law--if the plaintiff's son was contributorily

negligent and such contributory negligence contributed to the result here, then it's an absolute bar to recover by the plaintiffs.

The issue to be determined by you in this part of the case, namely the wrongful death and pain and suffering, are these: First, was the plaintiff negligent.

If your answer to that question is no, you will return a verdict for the defendant. But if your answer is yes, you then have a second issue to determine, namely, was the negligence of the defendant's a proximate cause of any injury to the plaintiff?

If your answer to that question is no, you will return a verdict for the defendant. But if your answer is yes, you should find the answer to the third question, namely, was the plaintiff contributorily negligent?

If you find he was not, having found in the plaintiff's favor in answer to the first two questions, you should determine the amount of the plaintiff's damages and return a verdict in the plaintiff's favor for that amount. On the other hand, if you find that the plaintiff

was contributorily negligent and that plaintiff's fault contributed as a proximate cause of any injuries which plaintiff may have sustained, you will return a verdict for the defendant.

And the second and fourth claims essentially are concerned with the negligence and contributory negligence question.

The first claim is concerned with the question of whether Sergeant Sehlmeyer's actions were without justification, arbitrary, with malice or with reckless and wanton and wilful abandonment, which is quite different than negligence and I am sure you can appreciate it.

And aos, the question as he says--in the second and fourth he says contributory negligence. And as to the first he says good faith and in the lawful line of duties as a police sergeant.

Okay.

The marshal will bring in the statement of Alan Loeffler.

(The jury returns to the jury room at 12:55 P.M. for the purpose of continuing their deliberations.)

MR. WEITZ: I ask that that statement go in.

THE COURT: Yes.

MR. WEITZ: I think we agreed this is the statement.

MR. GARDNER: I think I put on the record, if your Honor please, that I thought it would be an appropriate view as to the request of the statement of Miss Nelson that those portions which were in evidence, that they should have been instructed that they could be read that portion rather than leave it to them, since the jury might not know, although your Honor did instruct them on the initial charge as to whether or not it should be read.

THE COURT: I don't have to be doing more than that. If I had done that I would give some indication of something that should be done. I didn't want to take a position one way or another.

MR. GARDNER: It's now five to one. Can we adjourn for lunch and come back at two?

MR. WEITZ: Can I ask for an extra ten minutes until ten after two? I have a personal matter to take care of.

THE COURT: I don't think we have any problem on that.

MR. WEITZ: Thank you very much.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

HABER,

Plaintiff,

-vs-

NASSAU COUNTY,

Defendant.

- x

May 11, 1976
225 Cadman Plaza East
Brooklyn, New York

B e f o r e:

HONORABLE THOMAS C. PLATT,
USDCJ.

Paul Goldwert, C.S.R.,
Acting Official Court Reporter.

A p p e a r a n c e s:

HARVEY WEITZ, ESQ.,
Attorney for Plaintiff

JOHN GARDNER, ESQ.,
Attorney for Defendant.

--oOo--

THE COURT: I have got a second note. The first question says: "If we find in favor of plaintiff on Claim No. 1, do we then have to determine a monitary value for damages and, if so, will the officer be held responsible for that amount?"

The answers to those two questions, I think, is clearly yes.

MR. WEITZ: The second question I think relates to source of payment.

THE COURT: You are not going to get a statement as to insurance being in this case.

The question: "And if so, will the officer be held responsible for that amount," the answer is yes.

The second question is also on Claims Nos. 2 and 4. "If we find in favor of the plaintiff, do we have to determine a monitary value for damages,"

and the answer is yes.

"If so, do we determine the amount which each defendant pays?" The answer is no, but you have to make a separate determination as to whether the County of Nassau is liable in accordance with the instructions I gave you, but there is only one verdict.

MR. WEITZ: If your Honor please, I understand the import of the question. I do not think, however, that the additional instruction on the second portion is necessary.

THE COURT: I did not say I would reread it. I said they have to make a separate determination.

MR. WEITZ: I am not making myself clear. I am sorry. That instruction that they have to make a separate determination as to the County of Nassau, I do not think it is a necessary part of the answer to that part of the question.

THE COURT: Of course, it is.

MR. WEITZ: Judge, I have my objection.

THE COURT: Do you want to mark it Exhibit 2.

THE CLERK: Jurors' note received as Court's Exhibit 2.

(Whereupon at 2:30 the jury entered the courtroom.)

THE COURT: I have your note. I marked it Court's Exhibit No. 2. Your first question is if you find in favor of plaintiff on Claim No. 1, do you then have to determine the monitary value for damages. The answer is yes

If so, will the officer be held responsible for that amount? The answer is yes.

Your second question is on Claims Nos. 2 and 4. "If we find in favor of the plaintiff, do we have to determine monitary value of damages," and the answer is yes.

"If so, do we determine the amount which each defendant pays?" There is only one amount which you determine. The question is whether the County of Nassau is responsible for the acts of its employees in accordance with the instructions which I gave to you on that subject which, of course, you can have reread if you wish.

You do not have to determine--to apportion an amount, if that is what you are worried about but you have to make a separate determination whether Nassau County, as employer, is responsible for the act of its employee.

In other words, you have to make a determination

whether Nassau County is liable, but there is only one amount. You don't come in and state a separate amount as to each.

JUROR NO. 1: Could I ask a question?

THE COURT: Yes.

JUROR NO. 1: We can not distinguish between Sergeant Sehlmeyer or Nassau County?

THE COURT: Bear in mind, as to Claim 1 only Sehlmeyer is named as a defendant. As to Claims 2 and 4, you have first to determine whether Sergeant Sehlmeyer is liable and then you have got to determine whether the County of Nassau is responsible for his acts, in accordance with the instructions.

If you find that the County is liable, you return a verdict against both defendants. If you find only Sergeant Sehlmeyer liable, then you return a verdict only against Sergeant Sehlmeyer. One figure in each case.

MR. GARDNER: Juror No. 2 has a question.

THE COURT: Do you want me to repeat it?

JUROR NO. 2: Yes.

THE COURT: Try and stay with me. Only Sergeant Sehlmeyer is named in the first claim.

He is the only defendant in the first claim. If you determine a verdict against him, he will be responsible for whatever amount you render on that claim. It is not cumulative.

It is a parallel in the sense that your verdict in the first instance, you have got to determine whether you will find against Sergeant Sehlmeyer, and if you find against Sergeant Sehlmeyer, then you have to determine whether Nassau County is responsible for his acts.

If you determine that Nassau County is not, it is just a verdict against Sehlmeyer.

(Whereupon, the jury left the courtroom.)

MR. WEITZ: I think it might have been appropriate--I know it is late now because they are out but I didn't know the protocol.

I think really they wanted to know vicarious liability. That is what I thought the question was. In other words, vicarious liability should have been explained. I know you did it in the main charge.

THE COURT: I said I would reread that and you said it would be inappropriate.

MR. WEITZ: Judge, I am sorry. I am not

making myself clear.

THE COURT: Do you want me to reread the instructions with respect to the employer's responsibility for the employee's acts?

MR. WEITZ: I though that is what they wanted to know.

THE COURT: Bring them back.

MR. WEITZ: I didn't make myself clear the first time.

THE COURT: I thought you said the opposite.

MR. WEITZ: I didn't make myself clear to the Court.

(Whereupon, the jury entered the courtroom at 2:35)

THE COURT: There has been a lack of communication between me and the attorneys. As to Counts 2 and 4 where they are both named as defendants, and only as to Counts 2 and 4, I will reread the instructions where an employer is or is not responsible for his employee's acts.

An employer is not responsible for the acts of his employee unless the act is in furtherance of the employer's business and within the scope of the employee's authority.

An act is within an employee's authority if it

is performed while he is engaged generally in the business of his employer to which he was assigned or if his act may be reasonably said to be necessary or incidental to such employment. The employer need not authorize the specific act in question.

If you find that Sergeant Sehlmeyer, within the scope of his authority and in furtherance of the Nassau County Police Department, negligently caused injuries to the plaintiff, you will hold Nassau County responsible for such act, provided all of the other elements of my instructions, of course, are complied with.

Even though you find the employer specifically instructed the employee not to perform the act in question, if you find that the act was done in furtherance of the employer's business, you may find that it was within the scope of the employee's authority.

Even though you find the employee's act was reckless or wilfull, the employer, nonetheless, is responsible for the act if you find it was performed in furtherance of the employer's business and within the scope of his authority.

(Whereupon, the jury left the courtroom.)

PAUL GOLDWERT REPORTING

MR. GARDNER: If your Honor please, I must take exception to the fact that so much time has gone by since the request for a vital part of the evidence that the jury requested, and I do not know what went into the jury's mind in reaching whatever determination they may have individually or collectively reached or what rationale or reason they may have given for the failure of the requisite document to be given to them, which was requested at approximately fifteen minutes to one.

The jury has been in there and it is now twenty of three. Since that request at a quarter to one which was not complied with, the jury apparently may very well have come to some conclusions as to why the document requested was not furnished to them.

I submit to your Honor, I am afraid a grievous error may have been committed in terms of the lack of two hours and of giving them a document that they needed for discussion.

Now they have arrived with another document in the absence of any explanation as to why they did not get that which they requested.

THE COURT: Wait a minute. Do you think that

an instruction on the part of the Court can cure it?

MR. GARDNER: I have grave doubts, your Honor, because they apparently have continued in deliberations to come up with the questions which they have come up with now, which, as I view it, indicates they have come to a conclusion as to liability concerning who shares in the liability.

THE COURT: I think I can recall them and explain it was the clerk's error, and I do not know quite why because I thought it was understood it would be given to the Marshal and he was going to take it in, but apparently it was not and say, " You asked for this and you should consider it before you reach a decision."

MR. WEITZ: I think that would be inappropriate.

THE COURT: I think it is appropriate. It is clearly appropriate in view of their prior request.

MR. WEITZ: To say, "You should consider"?

THE COURT: "You should give such consideration as you had planned to give it prior to lunch time."

I think we ought to get them back and attempt to cure that much of the problem.

MR. WEITZ: For my part, may I say the request

came in shortly before lunch.

THE COURT: We know when it came in.

MR. WEITZ: Mr. Gardner's two hour time sequence--

THE COURT: They deliberated all during lunch. Bring them in.

(Whereupon, at 2:42 the jury entered the courtroom)

THE COURT: The attorneys are somewhat concerned, I think with some justification, that the exhibit, Mr. Luffler's statement, did not reach you. Apparently, in the confusion of the lunch hour when your request came just before lunch, it was put on the clerk's desk and he did not get it to the Marshal and it did not get to you.

My only instructions to you is, of course, you should give it whatever consideration you planned to give it when you made your request. I will leave it on that basis.

(Whereupon, the jury left the courtroom)

--oOo--

THE COURT: They want to know whether they can return a verdict based upon a majority or whether it must be unanimous. So I have to tell them it has to be unanimous. Mark it.

THE CLERK: Juror's not received as Court;s Exhibit 3.

(Whereupon, at 3:25 the jury entered to courtroom)

THE COURT: As i indicated to you in the main charge, your verdict must be unanimous.

--oOo--

THE COURT: They say, " I hate to be redundant but we are still confused on one issue regarding Claims 2 and 4." Can we find the following verdict: If we find in favor of plaintiff but against Nassau County only and not against the officer?"

The answer is, of course, no.

THE CLERK:: Jurors' note received as Court's Exhibit 4.

(Whereupon, at 4:00 the jury entered the courtroom)

THE COURT: I have your note. In answer to the specific question asked, the answer is no. As I said to you when you were last here, if you find against the defendant Nassau County, you must first find the defendant Sergeant Sehlmeyer liable under Counts 2 and 4. Then and then only may you proceed to determine whether or not Nassau County is liable in accordance with the instructions I read to you when we were last here.

JUROR NO. 1: Could you say it once more?

THE COURT: The answer to your specific question is no. You must first find under Claims 2 and 4 the defendant Sergeant Sehlmeyer liable before you may find the defendant Nassau County liable. I am not suggesting you find either of them liable, but in answer to your question, you must first find the defendant Sehlmeyer liable before you may consider Nassau County liable.

If the defendant Sehlmeyer is not liable, Nassau County is not liable.

(Whereupon, the jury left the courtroom)

--cOo--

THE CLERK: Jurors' note received as Court's Exhibit 5.

(Whereupon, at 4:12 the jury entered the courtroom)

THE COURT: Ladies and gentlemen, I have your note saying you have reached a verdict.

Mr. Foreman, will you stand and answer the questions that are asked you by the clerk with respect to Claims 1, 2 and 4.

THE CLERK: Mr. Foreman, how do you find, for the plaintiff of defendant Sehlmeyer, in Claim 1?

THE FOREMAN: We find in favor of the defendant.

THE CLERK: How do you find in Claim 2, for the plaintiff or defendant Sehlmeyer and defendant County of Nassau?

THE FOREMAN: We find in favor of the plaintiff. We find the Sergeant and Nassau County liable.

THE COURT: For how much?

THE FOREMAN: We lumped it in with No. 4.

THE COURT: You found a joint verdict?

THE FOREMAN: Yes.

THE COURT: What is your joint verdict for Claims 2 and 4?

THE FOREMAN: We find in favor of the plaintiff. The total joint verdict is determined to be $125,000.

THE COURT: Did you make any effort to separate the two claims?

THE FOREMAN: No. We thought it would be easier--

THE COURT: I think you ought to try and separate the two claims, one for the conscious pain and suffering and one for the wrongful death, the loss to the parents.

THE FOREMAN: If your Honor wishes.

THE COURT: I think you should.

(Whereupon, the jury left the courtroom)

--oOo--

THE COURT: Bring in the jury.

(Whereupon, at 4:17 the jury entered the courtroom)

THE COURT: Mark this.

THE CLERK: Jurors' note received as Court's Exhibit 6.

THE COURT: Mr. Foreman, you say you have split the award between Claims 2 and 4. What do you award on Claim 2?

THE FOREMAN: $100,000.

THE COURT: What about Claim 4?

THE FOREMAN: $25,000.

THE COURT: Do you want to poll the jury.

THE CLERK: Juror No. 1, is that your verdict?

JUROR NO. 1: Yes, it is.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: So say you all.

THE COURT: Ladies and gentlemen, you are discharged and I believe at this time that is all as to the extent of your jury service. You should take your cards and checkout with the clerk downstairs. Thank you very much.

MR. WEITZ: May both lawyers thank the jury for its time and deliberations. We know it was not an easy decision. We thank you all.

MR. GARDNER: If your Honor please, I renew the motion made at the end of the plaintiff's case, upon which your Honor reserved, to dismiss the plaintiff's case for the plaintiff's failure to prove a prima facie case.

THE COURT: Do you want to do that now or do you want to do it on paper?

MR. GARDNER: Whatever you prefer.

THE COURT: Do it any way. You have got to bear in mind I do not have a transcript of the record in front of me. All I have is the jury's

PAUL GOLDWAY REPORTING

verdict and my own notes. You can handle it any way.

MR. GARDNER: We will do it on papers, your Honor.

THE COURT: It must be done within ten days, as the Rules provide, unless the time is extended. Ten days from today would be May 21st, which is a week from Friday. Unless, if you are going to order the record or something, if you wish to apply for additional time, I think I have the right to extend the time.

MR. GARDNER: I was going to join two motions, one for a directed verdict N.C.V. and one to dismiss.

THE COURT: If you gentlemen are going to enter a judgment as distinguished from the clerk, I assume plaintiff will want to have more time. You have ten days from the entry of the judgment.

MR. GARDNER: I take it I do not have to move at this time or I am not clear as to stay of execution once the judgment is entered. I certainly think it would be appropriate.

THE COURT: You make that motion at the same time as you make the motion-- Yes, I will

stay it provided you make your two motions notwithstanding the verdict and, secondly, that you certify in that motion that you are going to appeal.

MR. GARDNER: Yes, your Honor. Does that require the posting of a bond, that stay?

THE COURT: Yes. You can request a bond and I will make a determination.

MR. GARDNER: That is ten days after entry of the judgment?

THE COURT: Yes. He has to serve a copy.

MR. GARDNER: Thank you, your Honor.

MR. WEITZ: Thank you.

--oOo--

MEMORANDUM AND ORDER BY PLATT, J., SETTING ASIDE VERDICT AND DISMISSING COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

MAX HABER, as executor of the Goods, Chattels and Credits that were of George Haber, Deceased, and MAX HABER, individually,

Plaintiff,

-against-

THE COUNTY OF NASSAU, and ROBERT SEHLMEYER,

Defendants.

- -x

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MEMORANDUM AND ORDER

September 8 , 1976

PLATT, D.J.

Defendants renew their motion made at the close of the proof on the entire case for a directed verdict and move for judgment notwithstanding the verdict or, in the alternative, for a new trial (FRCP 50).

The Court reserved decision on defendants' motion made at the end of the case and submitted the issues on the following three claims in plaintiff's complaint, as amended, to the jury:

1. An alleged violation of plaintiff's son, George Haber's, civil rights by the defendant Sehlmeyer (on which the jury returned a verdict for said defendant).

2. Wrongful death of George Haber based on the alleged negligence of the defendants (on which the jury returned a verdict for the plaintiff for $100,000).

3. Conscious pain and suffering of George Haber based on said negligence (on which the jury returned a verdict for the plaintiff for $25,000).

MEMORANDUM AND ORDER BY PLATT, J., SETTING ASIDE VERDICT AND DISMISSING COMPLAINT

Prior to the trial the defendant County of Nassau moved to dismiss all three claims on the ground of lack of jurisdiction. This Court granted said defendant's motion as to the first claim but denied it as to the second and third claims under the doctrine of pendent jurisdiction (411 F.Supp. 93 (E.D.N.Y. 1976)). Subsequent to the trial and verdict in this case the United States Supreme Court has in another case held the latter part of the Court's decision to be in error and that plaintiff's second and third state law claims are "without the statutory jurisdiction" of this Court. Aldinger v. Howard, et al., ____ U.S. ____, 44 LW 4988 (June 22, 1976). Accordingly, the verdict against the County of Nassau must be set aside and plaintiff's claims against said defendant must be and the same hereby are dismissed.

This then leaves only the second and third claims against the defendant Sehlmeyer. As to these, in view, inter alia, of the notes sent to the Court by the jury (Court's Exhibits 2 and 4):

> "(1) If we find in favor of the plaintiff on claim #1 do we then have to determine a monetary value for damages; and if so, will the Officer be held responsible for that amount?
>
> "(2) Also, on claims no. 2 & 4,* if we find in favor of the plaintiff do we have to determine a monetary value for damages? and if so, do we determine the amount which each defendant pays?
>
> Thomas Pasqua"

and

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* "Claim 4" was the "pain and suffering" claim referred to above as #3.

MEMORANDUM AND ORDER BY PLATT, J., SETTING ASIDE VERDICT AND DISMISSING COMPLAINT

"[Question] I hate to be redundant, but we are still confused on one issue. Regarding claims #2 and #4. Can we find the following verdict, if we so wish?

"In favor of the plaintiff, but against Nassau County only (and not against the Officer).

Thomas Pasqua",

a new trial must be ordered even if this Court's judgment notwithstanding the verdict against the defendant Sehlmeyer is not sustained.

It would be manifestly and grossly unfair to permit the verdict in a case such as this, rendered against a municipal corporate employer and its employee, to stand against an individual alone when it is discovered after the verdict that jurisdiction never existed against the corporate employer. It is in reality no different than having erroneously instructed a jury that an individual defendant was covered by an unlimited insurance policy and that they could consider that fact in arriving at a verdict.

Regardless of this recent development in the law, the Court had, prior to reading the Supreme Court's opinion in the Aldinger case, concluded that it had erred in its submission of the case to the jury and should have granted defendants' motion for a directed verdict on the ground that the proof as to George Haber's contributory negligence being a proximate cause of the accident herein, was overwhelming and essentially uncontradicted, and that it barred plaintiff from any recovery herein. The jury's contrary conclusion in this case has so shocked the conscience of this Court that it feels it cannot under any view of the facts sustain the same.

MEMORANDUM AND ORDER BY PLATT, J., SETTING ASIDE VERDICT AND DISMISSING COMPLAINT

For the moment and for the purpose of this portion of the motion, defendant Sehlmeyer's negligence as a proximate cause of the accident may be assumed. The sole question then is: Was George Haber guilty of negligence which contributed to or was a proximate cause of the same accident. The facts as to this are clear.

At approximately 8:30 PM on September 29, 1972 at a rock concert at the Nassau Coliseum, George Haber ingested 22 nanagrams per 100 liters of his blood of the hallucinogenic drug known as LSD in violation of the New York Penal Law § 220.05* and thereafter smoked an unspecified number of marijuana cigarettes and proceeded to go on a "trip" for a period of at least four hours. Compound use of drugs in this fashion indisputably potentiates the effects thereof.

Within three hours after such ingestion, George Haber had repeatedly tried to push his way back into the concert without a ticket, had lain on his stomach at one of the entrances looking at passers-by, had grabbed a 15 year old girl on the buttocks and seized another by the arm, had initiated a fight with Sgt. Sehlmeyer when the latter attempted to stop and question him, had slugged Sgt. Sehlmeyer to the ground and wrestled to a point on top of him, had broken loose from Sgt. Sehlmeyer and attempted to get away in the defendant's police car and had made further attempts to resist arrest and engage in fights and struggles with the defendant Sehlmeyer (New York State Penal Law §§ 240.25, 205.05, 130.55, 120.20, 120.00).

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* since revised -- see current §§ 220.03 and 220.09(5).

MEMORANDUM AND ORDER BY PLATT, J., SETTING ASIDE VERDICT AND DISMISSING COMPLAINT

Each and every one of George Haber's violent and abnormal actions and acts during the course of the defendant Sehlmeyer's attempt to stop and question him was caused by the undeniably negligent, indeed wilful, act of taking LSD and smoking"pot". All of his mindless and unreasonable conduct and behavior was governed and permeated by these acts. His mind was, to put it in the vernacular, "spaced out" and he was, simply stated, completely out of control.

To independent observers: "the kid was acting beserk"; "He wasn't a normal person"; he appeared "irrational", "violent" and "wild".

To say under such circumstances and the undisputed facts in this case that George Haber's wilful or negligent acts of taking drugs did not contribute to or proximately cause the result in this case is to indulge in nothing but pure fantasy and theory. The fact of the matter is that neither George Haber (drug-free) nor any other normal human being would have done or attempted to do that which George Haber did during the course of the events which concededly occurred unless he was (as Haber was) out of his mind.

It is axiomatic that an individual must be held responsible for his own acts. In this case George Haber must be held responsible for "spacing" himself "out" and causing himself to lose control of his mind and actions, conduct and behavior. Any other result would be to condone, nay encourage, individuals in a belief that the law will not hold them responsible for their own acts.

MEMORANDUM AND ORDER BY PLATT, J., SETTING ASIDE VERDICT AND DISMISSING COMPLAINT

In People v. Decina, 2 N.Y.2d 133, the Court of Appeals held that it was culpable negligence for one subject to epileptic attacks to operate a motor vehicle and made the following particularly pertinent observations (2 N.Y.2d at pp. 139, 140, 158 N.Y.S.2d 558 at pp. 564, 565 (1956)):

> ". . . The statute (Section 1053-a of the Penal Law) does not require that a defendant must deliberately intend to kill a human being, for that would be murder. Nor does the statute require that he knowingly and consciously follow the precise path that leads to death and destruction. It is sufficient, we have said, when his conduct manifests a disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given. . . .

* * *

> "To hold otherwise would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution under the statute. His awareness of a condition which he knows may produce such consequences as here, and his disregard of the consequences, renders him liable for culpable negligence, as the courts below have properly held (People v. Eckert, 2 N.Y.2d 126, decided herewith; People v. Kreis, 302 N.Y. 894; Matter of Enos v. Macduff, 282 App.Div. 116; State v. Gooze, 14 N.J. Super. 277). To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation (see Matter of Jenson v. Fletcher, 277 App. Div. 454, affd. 303 N.Y. 639), and there is simply no basis for comparing such cases with the flagrant disregard manifested here."

MEMORANDUM AND ORDER BY PLATT, J., SETTING ASIDE VERDICT AND DISMISSING COMPLAINT

So also in the case at bar, to hold that George Haber "may freely indulge himself" in LSD and marijuana "in the same hope that it will not affect his" conduct, and that "if it later develops that ensuing intoxication causes dangerous and reckless (acts) resulting in death, his unconsciousness or involuntariness at that time would relieve him from" being held culpably negligent, would be contrary to the laws of the State of New York.

Similarly, the New York courts have repeatedly held a plaintiff to be barred from recovery where "he consciously assumed the risk of the harm he ultimately suffered during the fight": Jones v. Kent, 35 A.D.2d 622, 623, 312 N.Y.S.2d 728, 730 (3d Dept. 1970); Ruggerio v. Board of Education, 31 A.D.2d 884, 298 N.Y.S.2d 149 (4th Dept. 1969), aff'd 26 N.Y.2d 849, 309 N.Y.S.2d 596 (1970); Utica Mut. Ins. Co. v. Amsterdam Color Works, 284 App. Div. 376, 131 N.Y.S.2d 782 (1st Dept. 1954), aff'd 308 N.Y. 816 (1955).

In the instant case it is true that the decedent may not "knowingly and consciously (have) follow(ed) the precise path that (led) to death and destruction", but it is equally true that "his conduct manifest(ed) a 'disregard of the consequences which (might) ensue from the act (of taking drugs), and indifference to the rights of others" (2 N.Y.2d at p. 139). There is no question but that such act was negligent (if not criminally or culpably negligent) and contributed to or was a proximate cause of the eventual accident herein.

MEMORANDUM AND ORDER BY PLATT, J., SETTING ASIDE VERDICT AND DISMISSING COMPLAINT

In addition, although there is no need to consider the matter in the light of the foregoing, there is a substantial question whether plaintiff proved any negligence, as distinguished from an assault or intentional tort, on the one hand, or justifiable conduct in an emergency on the other, on the part of the defendant Schlmeyer. "Monday-morning quarterbacking may well be permissible in football, but it has no place in the law. As the New York Court of Appeals has repeatedly said (2 N.Y.2d at p. 67):

> "When a defendant is faced with an emergency without opportunity for deliberation, thought or consideration, the ensuing accident may be within the field of nonliability for injury. Meyer v. Whisnant, 307 N.Y. 369, 121 N.E.2d 372; Prosser on Torts [2d ed.], §32, pp. 137-138."

Rowland v. Parks, 2 N.Y.2d 64, 67, 156 N.Y.S.2d 834, 836 (1956); Amaro v. City of New York, ___N.Y.2d ____ (June 7, 1976); Lowery v. Manhattan Ry. Co., 99 N.Y. 158, 1 N.E. 608 (1885).

Given all of the foregoing, defendants' motion for judgment notwithstanding the verdict must be, and the same hereby is, granted, and judgment should be entered for the defendants herein dismissing plaintiff's complaint.

SO ORDERED.

Thomas C. Platt

U.S.D.J.

JUDGMENT APPEALED FROM.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MAX HABER, as executor of the Goods, Chattels and Credits that were of George Haber, Deceased, and MAX HABER, individually,

Plaintiff,

- against -

THE COUNTY OF NASSAU, and ROBERT SEHLMEYER,

Defendants.

FILED IN CLERK'S OFFICE U.S. DISTRICT COURT E.D. N.Y. ★ SEP 10 1976 ★ TIME A.M. P.M.

★ JUDGMENT

73 C 1408

A memorandum and order of Honorable Thomas C. Platt, United States District Judge, having been filed on September 8, 1976, setting aside the verdict against the County of Nassau and dismissing plaintiff's claims against the County of Nassau and granting the motion of defendants', County of Nassau and Robert Sehlmeyer, for judgment notwithstanding the verdict and directing judgment to be entered for the defendants, dismissing the complaint, it is

ORDERED and ADJUDGED that the verdict against the defendant, County of Nassau, is set aisde and that the motion of defendants, County of Naasau and Robert Sehlmeyer, for judgment notwithstanding the verdict is granted and the complaint is dismissed.

Dated: Brooklyn, New York
September 10, 1976

Lewis Orgel
Clerk

By: Thomas Boastelle
Chief Deputy Clerk

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

MAX HABER, individually, and as Executor of the Goods, Chattels and Credits which were of GEORGE HABER, Deceased,

Plaintiff,

Docket No.
~~74~~ C 1408
73
(T.C.P.)

NOTICE OF APPEAL

-against-

THE COUNTY OF NASSAU and ROBERT SCHLEYER,

Defendants

- -X

S I R S:

PLEASE TAKE NOTICE, that plaintiff, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in this action on the 10th day of September, 1976, dismissing plaintiff's complaint.

Dated: New York, N.Y.
October 5, 1976

Yours, etc.,

SCHNEIDER, KLEINICK & WEITZ
Attorneys for Plaintiff

by Arnold L Kleinick
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